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JUDGES
OF THE
U. S. CIRCUIT AND DISTRICT COURTS
FOR THE NINTH CIRCUIT,
DURING THE PERIOD OF THESE REPORTS.

HON. STEPHEN J. FIELD,
Justice of the Supreme Court allotted to the Circuit.
HON. LORENZO SAWYER,
Circuit Judge.

DISTRICT JUDGES.
HON. OGDEN HOFFMAN, . Northern Dist. California.
HON. ERSKINE M. ROSS, . Southern Dist. California.
HON. MATTHEW P. DEADY, District of Oregon.
HON. GEORGE M. SABIN, . District of Nevada.

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DECISIONS
OF THE
CIRCUIT AND DISTRICT COURTS
OF THE
UNITED STATES, FOR THE NINTH CIRCUIT.

DIXON *v.* WESTERN UNION TELEGRAPH COMPANY.

CIRCUIT COURT, NORTHERN DISTRICT OF CALIFORNIA.

APRIL 1, 1889.

1. REMOVAL OF CAUSES—TIME OF APPLICATION—STIPULATIONS EXTENDING TIME TO PLEAD. — Under the removal act of 1857, requiring the petition for removal to be filed "at the time, or any time before, the defendant is required by the laws of the state, or the rule of the state court in which the suit is brought, to answer or plead to the declaration or complaint," an extension of time to answer by consent of parties does not extend the time for filing the petition for removal.

Before SAWYER, Circuit Judge.

On motion to remand.

Mr. E. H. Wakeman, and Mr. Henry H. Davis, for plaintiff.

Messrs. Doyle, Galpin & Zeigler, for defendant.

SAWYER, Circuit Judge. This action was brought in the superior court of San Francisco, a state court, and removed to this court on petition of the defendant. The petition was not filed in time. The summons was served in San Francisco on October 12, 1888. The law and the summons required the defendant to answer within ten days after service. At the expiration of ten days, on October 22d, the defendant entered an appearance, but the petition was not filed till November 1st, ten days after an

answer was due, and after appearance actually entered. Probably there was an extension of time to answer by consent of parties, but it does not appear whether there was or not. Whether there was or not, can make no difference. The act of 1887 requires the petition to be filed in the "state court, at the time, or any time before, the defendant is required by the laws of the state, or the rule of the state court in which the suit is brought, to answer or plead to the declaration or complaint," not at or before the expiration of the extended time within which parties may choose to stipulate for the filing of an answer or demurrer. The prior act allowed the petition to be filed at any time during the term at which it might first be tried. But the supreme court repeatedly held that the act meant the term at which it could be first at issue, and be ready for trial, provided the parties filed their pleadings at the time appointed by law, whether the court or the parties were ready for trial or not. And it was also held that the prolongation of the time of joining issue by orders of the court, or a stipulation for time between the parties, could not extend the time for filing a petition for removal to the next term. (*Pullman Palace Car Co. v. Speck*, 113 U. S. 84; *Gregory v. Hartly*, 113 U. S. 746.) And this has often been the ruling in this court, as will be seen by consulting the reports of its decisions. Even the statute as thus construed was deemed by Congress to be too liberal, and in 1887 the act was amended so as to require the petition to be filed at or before the time when the law required the defendant to plead. This law must be construed in the same way as the former, as to the matter of extending the time to plead by the court, or by stipulation of the parties. The party must make his election, and file his petition, at or before the time when his pleading is first due, under the law, or he waives his right to a removal. The petition in this case was not in time, and the case must be remanded on that ground, and it is so ordered.

UNITED STATES v. FORTY-EIGHT POUNDS OF RISING STAR
TEA, ETC.

CIRCUIT COURT, NORTHERN DISTRICT OF CALIFORNIA.

APRIL 1, 1889.

1. INDIANS—TRADING IN INDIAN COUNTRY—KLAMATH RESERVATION.—The act of April 8, 1864, provides that there shall be set apart by the President, at his discretion, not exceeding four tracts of land, in California, for Indian reservations; that "said tracts to be set apart as aforesaid" may, or may not, in his discretion, include existing reservations; and that the reservations which shall not be retained shall be surveyed and sold as therein provided. Four tracts were afterwards set apart, none of them including the previously existing Klamath reservation. *Held*, that such Klamath reservation was not "Indian country," within the meaning of the Revised Statutes, section 2133, prescribing the penalty for unauthorized trading in the Indian country. (Affirming, 35 Fed. Rep. 403.)

Before SAWYER, Circuit Judge.

On appeal from district court. (35 Fed. Rep. 403.)

Seizure for violation of Revised Statutes, section 2133.
Libel dismissed, and the United States appeal.

Mr. John T. Carey, for United States, appellant.

Mr. J. E. McElrath, and *Mr. D. T. Sullivan*, for respondent.

SAWYER, Circuit Judge. The only question in this case, is, whether the country within the Klamath Indian reservation, as set apart in 1855, is "Indian country," or "any Indian reservation," within the meaning of section 2133 of the Revised Statutes, as amended July 31, 1882. (22 Stats. 179.) Section 2 of the act of Congress of April 8, 1864 (13 Stats. 40), provides "that there shall be set apart by the President, and at his discretion, not exceeding four tracts of land within the limits" of the state of California for Indian reservations; and it further provides "that the said tracts to be set apart as aforesaid may, or may not, as in the discretion of the President may be deemed for the best interest of the Indians to be provides for, include any of the Indian reservations heretofore set apart in said state," etc. This statute contemplates future action by the President, as is manifest by the words, "shall be set apart,"

and the words subsequently used, "said tracts to be set apart as aforesaid." Section 3 provides "that the several Indian reservations in California which shall not be retained for Indian reservations under the provisions of the preceding section of this act" shall be surveyed and sold as thereafter provided. The President did thereafter act from time to time, and he did set off four tracts in different parts of the state for the purposes provided for, and he did not include in any one of them the "Klamath Indian reservation," theretofore set apart. In setting apart these four reservations without including the Klamath reservation, he necessarily exercised his discretion, and, by implication at least, excluded them. As they were not retained by the future and further action of the President "for the purposes of Indian reservations," "under the provisions of the preceding sections of this act," the reservation, by the terms of the act itself, abolished or abrogated the prior reservation. This necessarily follows from the provision requiring these lands not embraced in the reservations made by the action of the President under that act to be cut up into lots of suitable size and sold, as provided in the act. It is true that they were not thrown generally into the general system of public lands to be disposed of to pre-emptors and others according to that system; but they were to be disposed of under special provisions, as in the act provided. The lands ceased to be an "Indian reservation," and they, certainly, were not "Indian country," within the meaning of section 2133 of the Revised Statutes, under which the libel in this case was filed. I concur with the district court in the views taken as reported in this case, 35 Fed. Rep. 403. The decree of the district court dismissing the libel must therefore be affirmed, and the libel dismissed; and it is so ordered.

MANCHESTER FIRE ASSUR. Co. v. STOCKTON COMBINED
HARVESTER AND AGRICULTURAL WORKS.

(Thirteen cases of similar character.)

CIRCUIT COURT, NORTHERN DISTRICT OF CALIFORNIA.

APRIL 4, 1889.

1. EQUITY — JURISDICTION — ADEQUATE REMEDY AT LAW. — Bills to have an adjustment of a loss under several insurance policies declared void for fraud, and to restrain actions thereon filed by the several insurance companies, would not avoid multiplicity of suits; and they are not bills for discovery, defendant being a corporation, and its officers not being parties, and answers on oath being waived, and the testimony being obtainable by examining the persons having knowledge as witnesses. The companies have a plain, adequate, and complete remedy at law, and suits in equity, therefore, under Revised Statutes, section 723, are not maintainable.

Before SAWYER, Circuit Judge.

In equity. On demurrers to the bills.

Bills by the Manchester Fire Assurance Company against the Stockton Combined Harvester and Agricultural Works, and by twelve other insurance companies against the same defendant. Revised Statutes, section 723, provides that "suits in equity shall not be sustained . . . in any case where a plain, adequate, and complete remedy may be had at law."

Messrs. Van Ness & Roehr, for complainants.

Mr. W. S. Dudley, for defendant.

SAWYER, Circuit Judge. The complainant and twelve other insurance companies had issued policies of insurance upon defendant's works, machinery, and manufactured implements on hand. The property insured was destroyed by fire, and the value of the property destroyed was alleged by the defendant to be one hundred and forty-two thousand dollars. An adjustment was finally made between the several companies and the defendant, by which the loss by mutual agreement was adjusted at ninety thousand dollars. The complainant now files its bill in equity, alleging that this adjustment was procured by misrepresentation of facts, and fraud on the part of the defendant, and that defendant is

about to sue complainant upon the adjustment as made for its share of the loss. It asks that the adjustment be declared void on the ground of fraud, and that the defendant be enjoined from suing upon it. The twelve other companies have filed similar bills. The defendant demurs on the ground that the fraud alleged is equally available, as a defense at law, and that the defendant, therefore, has a plain, adequate, and complete remedy at law within the meaning of section 723 of the Revised Statutes. The point, I think, is well taken. The bill certainly presents no stronger case for the exercise of equity jurisdiction than *Buzard v. Houston*, 119 U. S. 347, where it was sought to have a contract rescinded on the ground of fraud, and the supreme court denied the jurisdiction, under section 723 of the Revised Statutes, cited. The bill would not avoid a multiplicity of suits. Indeed, one suit at law with different counts against each company might settle the whole matter. Should complainant maintain the bill, it would be sued upon the several policies, and the loss would have to be re-adjusted in a suit upon each of the policies. If it should fail to maintain its bill, it would still be liable to the several suits on the adjustment. The bill is in no sense a bill of discovery. The suit is against a corporation, and there can be no discovery by a corporation unless its officers or agents, who know the facts, are made parties. Corporations do not answer upon oath, but under the corporate seal. The corporation is a non-sentient being, and, except through its officers and agents, has no knowledge. Besides, an answer upon oath is expressly waived in the bill. So also there is no need of a discovery, as the testimony can be much more effectively obtained by examining all the parties having knowledge as witnesses. They are now all competent witnesses. In view of the statute cited, I see no ground for maintaining a bill in equity in this case. Let the demurrers in the several cases be sustained and the bills dismissed.

1889.]

Opinion of the Court—Hoffman, J.

HERMAN SHAINWALD, ASSIGNEE, ETC., v. HARRIS LEWIS.

DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA.

APRIL 8, 1889.

1. **BANKRUPTCY.**—Where an action was brought on a decree of the court obtained by an assignee in bankruptcy against one H. for a fraudulent conversion of the assets of a bankrupt firm, and subsequently to the rendering of the decree separate suits had been commenced against two co-conspirators in the perpetration of the fraud, in one of which judgment had been obtained by the assignee and the other of which was pending, and the assignee entered into an arrangement with the co-conspirators to discontinue further proceedings against them on the payment by them of a large sum of money, which being made, he consented to an order setting aside and vacating the judgment obtained against one of them, and dismissed the suit against the other. *Held*, that the money so received should be credited on the original decree against H. in part satisfaction and payment thereof, and this notwithstanding that the assignee had obtained from the co-conspirators a declaration or statement in writing that the money paid by them was not paid “or received, in payment or satisfaction, or on account of any claim, demand, or cause of action set forth or alleged in plaintiff’s complaint.” But that the moneys were paid “to re-imburse the plaintiff for the costs, expenses, disbursements, and attorney and counsel fees incurred by him in the above-entitled action.”

Before HOFFMAN, District Judge.

Mr. James L. Crittenden, Esq., solicitor for complainant.*Mr. Walter J. Tuska*, counsel for defendant.

HOFFMAN, J. This is an action brought by Herman Shainwald, assignee in bankruptcy, on a judgment recovered in this court against Harris Lewis, November 5, 1880 (in case No. 221). The execution in that case having been returned unsatisfied, a creditor’s bill was filed and a receiver appointed, to whom Lewis was compelled to make a general assignment of his property, choses in action, etc.

On the 6th of April, 1881, a suit was commenced by the assignee against Joseph Naphtaly and Edward Hyams to recover damages from them, as co-conspirators with Lewis in the frauds, for which judgment had been rendered against him.

The defendants in these suits severed in pleading.

In the suit against Hyams two trials were had, in the second of which a verdict was found against him, and judgment entered October 13, 1883, for the sum of \$78,400, and costs, taxed at \$328.

The suit against Naphtaly was not brought to trial. The execution against Hyams was returned *nulla bona*.

On the 31st of October, 1883, a stipulation was signed by the attorney for the assignee, agreeing that the verdict and judgment rendered and entered as against Hyams should be vacated and set aside, and that the action as against him should be dismissed. An order to that effect was entered on the same day.

On the 10th of November, 1883, the attorney for the assignee filed a consent that the suit against Naphtaly should be dismissed, and an order to that effect was duly entered.

On the same days the assignee, or his attorney, received from Hyams the sum of \$30,650, and from Naphtaly the sum of \$20,000.

Contemporaneously with the filing of the stipulation and entry of the order in the Hyams case (viz., October 31, 1883), but it would seem after the payment of the money by him, an agreement was entered into between him and the assignee, or his attorney, as follows:—

“Herman Shainwald, Assignee, etc., v. Joseph Naphtaly and Edward Hyams.

“It is understood and agreed by us, and each of us, that the money paid to the plaintiff in the above-entitled case is paid on behalf of the defendant Hyams to re-imburse the plaintiff for the costs, expenses, disbursements, and attorney and counsel fees, paid and incurred by him in the above-entitled action, and that none of it is paid, or received in payment or satisfaction, or on account of any claim, demand, or cause of action set forth or alleged in the plaintiff's complaint in the above-entitled action; and that the parties paying said moneys hereby renounce all claims, right, and interest of, in, and to all of the same, and forever renounce and disclaim all rights and causes of action for the same, and hereby acknowledge, admit, confess, and declare that they, and each of them, have received not only a good and sufficient, but adequate and full consideration for said moneys, and all of the same from the plaintiff in the above-entitled action.

(Signed)

“HYAMS BROS.

“WILLIAM HYAMS.”

1889]

Opinion of the Court — Hoffman, J.

On the 10th of November, 1883, the date of the order discontinuing the suit against Naphtaly, a similar agreement or declaration was signed by him as follows:—

“Herman Shainwald, as Assignee, etc., v. Joseph Naphtaly and Edward Hyams.

“It is understood and agreed by me that all the money paid to the plaintiff in the above-entitled action is paid on behalf of the defendant Naphtaly to re-imburse the plaintiff for costs, expenses, disbursements, and attorney and counsel fees, paid and incurred by him in the above-entitled action, and that none of it is paid or received in payment or satisfaction, or on account of any cause of action set forth or alleged in the plaintiff's complaint in the above-entitled action; and that the said Joseph Naphtaly, the party paying said moneys, hereby renounces all claim, right, and interest of, in, and to all of the same, and forever renounces and disclaims all rights and causes of action for the same, and hereby acknowledges, admits, confesses, and declares that he has received not only a good and sufficient, but adequate and full consideration for said moneys, and all of the same, from the plaintiff in the above-entitled cause.

“San Francisco, Nov. 10, 1883.

(Signed)

“J. NAPHTALY.”

On the 19th of December, 1883, the counsel for Harris Lewis made a motion to the court for an order directing the clerk to enter satisfaction of the judgment obtained against Lewis, on the ground that the payments by Hyams and Naphtaly, co-conspirators with Lewis, constituted a satisfaction of the whole tort for which the plaintiff had obtained judgment against Lewis.

This motion, the court, after hearing elaborate arguments, denied.

The same point is relied on as a defense in the present suit, brought upon the original judgment against Lewis. It is urged by the attorney for the plaintiff that the question was finally passed upon by the court on the hearing of the motion to enter satisfaction of the original judgment; that it is, there-

fore, *res adjudicata*, and final and conclusive upon the court, and upon the parties to this suit.

This question it is not material to consider, for I am still of opinion that my decision denying the motion was correct; but I may observe, that if I were satisfied that it was incorrect I should not hesitate so to declare in deciding this suit, and that I should not feel bound on the ground of a previous ruling which I recognized as erroneous to repeat the same error in this suit, and to enter a judgment, which I believed should be reversed on appeal.

Assuming, therefore, that the payments in question do not amount in law to a satisfaction of the judgment obtained against Lewis, or an absolute release to them from further liability under it, the question arises, for what sum should judgment be entered against him in the present suit.

In ordinary cases the payment by one or more of several tort-feasors and co-conspirators in the commission of a wrong, after suit brought and judgment rendered, is a payment on account of and in satisfaction, in whole or in part, of the cause of action on which the suit is founded, unless otherwise intended or agreed.

This inference the attorney for the assignee has attempted to repel by obtaining from the parties a declaration that the moneys were paid by them to re-imburse the assignee for costs, disbursements, expenses, and counsel fees in the suit brought against them, and not on account or satisfaction of the cause of action on which it was brought; and that they have received full, adequate, and good consideration for the moneys so paid.

But are these declarations and agreements on the part of Hyams and Naphtaly to be received by the court as final and conclusive, and as precluding any inquiry into the true nature and effect of the transaction?

It is true that the declarations and agreements state that no part of the money was paid in satisfaction, or on account of the claim, demand, or cause of action on which suit had been brought. If this be true, the judgment against Hyams remained unsatisfied, in whole or in part, and the cause of action against Naphtaly continued intact and unimpaired. And yet,

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on the very day these declarations and payments were made the judgment against Hyams was vacated and set aside by consent, and the case dismissed, and the suit against Naphtaly discontinued.

Hyams and Naphtaly admit that they have received full and adequate consideration for the moneys paid by them. It is obvious that that consideration was the abandonment and dismissal of the proceedings against them, and no other.

I hardly think the attorney for the assignee would have felt himself at liberty, under the circumstances, to commence new suits upon the old cause of action (even if the statute of limitations had not run against them), and to aver that the moneys received by the assignee had been paid as a kind of gratuity to reimburse the assignee for expenses and counsel fees, and that the original cause of action remained unsatisfied in whole or in part.

The statements, therefore, of Hyams and Naphtaly that the large sums of money paid by them were paid to reimburse the assignee for expenses, etc., and not on account of the cause of action sued on, must be wholly disregarded. They were paid in consideration of the abandonment of the suits brought against them and their discharge from further liability. They were received by the assignee, not as a personal gratuity to him, but as representing the creditors, and in part satisfaction of the damages sustained by them by reason of the fraudulent conspiracy, into which Hyams and Naphtaly, with Lewis and others, had entered.

The sums thus collected were assets of the estate belonging to the creditors whom he represented, and distributable among them, after deducting the amount of reasonable and necessary expenses, disbursements, and counsel fees, which might be allowed by the court. It may incidentally be observed that no accounts were filed by the assignee until April 17, 1888, and then upon the order of the court and on motion of one of the bankrupts; nor has any sum whatever been distributed among the creditors.

In actions on torts the plaintiff may have several judgments, but only one satisfaction.

The amounts paid by Hyams and Naphtaly were in part satis-

faction of the tort committed by all the conspirators. They should, therefore, be deducted from the original judgment entered against Lewis.

It appears that the receiver of the estate of Harris Lewis appointed by the court has also collected and received on account of the judgment recovered against Lewis the sum of \$11,919.63, and that \$150 has been allowed as counsel fees. Whether this sum remains in the hands of the receiver is not shown.

As it was collected under the judgment against Lewis, or the assignment by him made to the receiver, it seems clear that the net amount paid to the receiver, after deducting the counsel fee allowed by the court and other reasonable and necessary expenses incurred in collecting it, should be credited on the judgment against Lewis.

What the total amounts collected by the receiver have been, and what the net amounts to be applied in part satisfaction of the judgment should be, the court cannot now say, as the receiver has not made any report or rendered any account to the court since December 15, 1885.

In the bill filed in the present case a writ of *ne exeat republica* is prayed for.

This cannot be granted for many reasons. Among others may be mentioned:—

First—The object and scope of the bill is to keep alive and renew the judgment heretofore rendered against Lewis in suit numbered 221, and to prevent the statute of limitations from becoming a bar to its enforcement.

The practical operation of the decree to be rendered is to give new vitality for a period of five years to the former judgment, which is about to become inoperative by lapse of time.

In the present suit no additional or affirmative relief can be granted beyond that afforded and adjudged in the judgment on which suit is brought. In that suit a writ of *ne exeat republica* was not awarded.

Second—The bill alleges, upon information and belief, that the defendant, unless restrained, will and intends to leave and depart from and out of the state of California, and from out of the jurisdiction of this court.

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This averment is denied by the answer. No proofs in support of it are produced.

Section 717, Revised Statutes, provides, "that no writ of *ne exeat* shall be granted unless a suit in equity is commenced, and *satisfactory proof* is made to the court or judge granting the same that the defendant designs *quickly to depart from the United States.*"

Third—A writ of *ne exeat* was granted in the suit numbered 231, which was a creditor's bill filed in aid of the original judgment in suit No. 221. The decree in suit No. 231 was rendered May 20, 1881.

The defendant gave bonds and the writ was discharged and the defendant released from custody on December 9, 1881. The defendant has thus been under bonds not to leave this State for more than seven years. During all that time he has remained within the jurisdiction of this court.

The writ of *ne exeat* is in its nature a temporary and provisional remedy. It is not intended to operate as a perpetual and live-long restraint upon the defendant's freedom of movement.

To grant it in this suit (if the court had power to do so), for an indefinite period, would be equivalent to committing the defendant to jail, the jail limits being the boundaries of the Northern District of California.

An injunction may issue, not as prayed for in the bill, but as granted in the original judgment on which this suit is founded.

The counsel for defendant may draft and submit a decree in accordance with this opinion. He may also take such steps, as he may be advised, to compel the receiver to report the sums collected by him from the estate of Harris Lewis under the judgment rendered against him, or the assignment executed by him to the receiver, and also the sums paid out by him for expenses, etc., for collection, to the end that the amount to be credited to Lewis on the judgment against him may be ascertained and liquidated.

These accounts, as well as those of the assignee, should be closely scrutinized. The court cannot avoid noticing that the total amount of debts in the bankrupt's schedule is stated to be

about \$44,257.25. The amount of debts *proved* is \$29,770.73. The sums received by the assignee and receiver amount to at least \$62,419.63, no part of which has been distributed to creditors.

WILLIAM H. WATKINDS v. THE SOUTHERN PACIFIC COMPANY.

CIRCUIT COURT, DISTRICT OF OREGON.

MAY 15, 1889.

1. **CONTRIBUTORY NEGLIGENCE.** — Contributory negligence is a defense, which necessarily implies negligence on the part of the defendant, and is therefore a plea of confession and avoidance.
2. **IDEM.** — A statement in an answer purporting to be a defense of contributory negligence, to an action for damages for an injury to the person, which only denies that the injury was caused by the negligence of the defendant, and alleges that it was “wholly” caused by the negligence of the plaintiff, is not such a defense, but only a denial of the plaintiff’s negative allegation, that the injury was not caused by his negligence, and needs no reply.
3. **IDEM — DENIAL OF, BY PLAINTIFF.** — Where the plaintiff alleges in his complaint that the injury, which is the subject of the action, was not caused by any fault or negligence on his part, and the defendant, instead of moving to strike out the allegation, specifically denies the same, an issue is formed on the question of contributory negligence, and no further pleading is necessary thereabout.
4. **MOTION FOR JUDGMENT ON THE PLEADINGS.** — A motion for a judgment on the pleadings will not be allowed under section 78 (Comp. 1887), unless the defense is admitted by the failure to reply thereto, and the matter contained therein is not otherwise contested or put in issue in the pleadings, and is sufficient to justify the judgment.

Before DEADY, District Judge.

Mr. John M. Gearin, for plaintiff.

Mr. Earl C. Bronaugh, for defendant.

DEADY, J. This action is brought to recover damages for an injury to the person of the plaintiff, alleged to have been caused by the negligence of the defendant, in failing to keep a light on the way or approach to its railway station at Lebanon, Linn County, Oregon.

The action was brought in the state circuit court for said county, and removed here by the defendant, a corporation formed under the laws of Kentucky, the plaintiff being a citizen of Oregon.

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In his complaint the plaintiff alleges that the injury occurred “through no fault nor negligence” of his.

In its answer the defendant “denies that through no fault or negligence of plaintiff” he was injured as alleged in the complaint.

The answer also contains a statement erroneously styled “a *further and separate* defense,” in which it is alleged that the defendant used due care and diligence in the matter complained of, and that the alleged injury to the plaintiff was not caused by any negligence on the part of the defendant, but was “wholly owing to the negligence and fault of the plaintiff himself.”

No reply having been filed to this so-called “defense,” the defendant moves the court for “judgment against the plaintiff on the pleadings, and for want of a reply, and for costs and disbursements.”

The motion was first made without notice to the adverse party, but the court refused to hear it until due notice of the same was given, which was done. It is made under section 78 (Comp. 1887), which provides that “if the answer contains a statement of *new matter*, constituting a defense, and the plaintiff fails to reply thereto, the defendant may move the court for such judgment as he is entitled to on the pleadings.”

The motion assumes that this answer contains “new matter,” constituting the defense of contributory negligence.

Contributory negligence is a defense to this action, but it is only a defense. And therefore the plaintiff need not allege nor prove that he was without fault in the premises. (*Washington etc. R. R. Co. v. Gladmon*, 15 Wall. 401; *Knaresborough v. Belcher S. M. Co.* 3 Sawy. 446; *Holmes v. Holmes*, 6 Sawy. 289; *Conroy v. Oregon Construction Co.* 10 Sawy. 630; *Grant v. Baker*, 12 Or. 329; *Ford v. Umatilla County*, 15 Or. 313.)

But the plaintiff having chosen to allege in his complaint that the injury occurred without fault or negligence on his part, and the defendant having chosen to meet this allegation with a specific denial of the same, there is an issue of fact formed on this question, which must be tried as such before a judgment can be given in the case.

The statute in authorizing a judgment on the pleadings, in

case no reply is made to a defense, presupposes that the facts constituting such defense are not elsewhere stated or put in issue in the pleadings—in short, that they are “*new matter*.”

Admitting then, for the sake of the argument, that the defense of contributory negligence is well pleaded and uncontroverted by a reply, still the same matter is put at issue by an allegation of the complaint and a denial of the answer.

The court cannot give judgment for the defendant on the pleadings, unless, when taken as a whole, the fact or facts necessary to the support of such a judgment are thereby admitted.

True, the defendant contends that the fact of contributory negligence, as alleged in this defense, is admitted, because no reply has been filed thereto. But the plaintiff had already alleged that he was not guilty of contributory negligence, and the defendant by denying the same took issue with him thereon. An issue having been reached on this question between an allegation of the complaint and a denial of the answer, there is no necessity for any further pleading thereabout.

I know it may be said that this allegation not being necessary to the statement of the plaintiff's case, is immaterial, and the issue taken upon it is so likewise. But it anticipates and controverts a possible defense to the action, and the defendant having accepted the controversy in this form, by taking issue on the allegation, I do not think it can be heard to say the issue is an immaterial one and ought on this motion to be disregarded.

But this defense is not a good plea of contributory negligence, and is nothing more than another “denial” of the plaintiff's allegation that the injury was not caused by any fault or negligence on his part.

Contributory negligence—negligence on the part of the plaintiff—necessarily implies negligence on the part of the defendant. It implies that the concurring negligence of the two parties caused the injury, and but for this concurrence it would not have occurred.

Contributory negligence is therefore a defense which confesses and avoids the plaintiff's cause of action, as stated in the complaint. (Am. & Eng. Encycl. of Law, 17, 19; *Kentucky Cent. Ry. Co. v. Thomas*, 79 Ky. 164; 42 Am. Rep. 208.)

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This defense confesses nothing, but avers that the defendant was not guilty of negligence, and that the injury sustained by the plaintiff was wholly owing to his own negligence.

As I have said, it amounts to nothing more or less than another denial of the allegation in the complaint, that the injury in question was not caused by the fault or negligence of the plaintiff. (*Hoffman v. Gordon*, 15 Ohio St. 215.) This being the character of the pleading, it needed no reply, and might properly have been stricken from the answer as redundant. The motion is denied.

HENRY C. WILSON v. NEHEMIAH FINE.

CIRCUIT COURT, DISTRICT OF OREGON.

MAY 20, 1889.

1. **POSSESSION OF REAL PROPERTY — ACTION TO RECOVER.** — Prior possession of real property is a sufficient legal estate therein, to enable a party to maintain ejectment in this court for the recovery of the possession of the same from an intruder.
2. **IDEM.** — An action to recover the possession of real property is none the less an action at law, because the legislature of the state wherein the property is situate has provided that the same may be maintained, as against an intruder, on the certificate of a register and receiver, or other evidence of title to, or interest in, the premises, short of a patent from the United States; and under section 919 of the Revised Statutes, the same may be maintained in the national court sitting in such state.
3. **ENTRY AND CERTIFICATE UNDER THE HOMESTEAD LAW.** — An entry and certificate issued to a settler under the homestead act, for land subject to entry thereunder, cannot be set aside or canceled by the land department on its own motion, for fraud or mistake committed or occurring in obtaining or issuing it; in such case the government must seek redress in the courts, where the matter may be heard and determined according to the law applicable to the rights of individuals under like circumstances. (*Smith v. Ewing*, 11 Sawy. 56, affirmed.)

Before DEADY, District Judge.

Mr. Charles B. Bellinger, for plaintiff.

Mr. Albert H. Tanner, for defendant.

DEADY, J. This action is brought to recover possession of the northwest quarter of section 17, in township 36 north, of range 25 east, and situate in Lake County, Oregon.

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It was commenced on February 27, 1889, and on April 5th the defendant appeared specially, and moved to set aside the service of the summons, because he had not been served with a copy of the complaint, as required by section 55 of the Compilation of 1887, which provides: "The summons shall be served by delivering a copy thereof together with a copy of the complaint, prepared and certified by the plaintiff . . . or by the county clerk."

On the hearing of the motion, it appeared that the defendant had been served with what purported to be a copy of the complaint, prepared and certified by the clerk of this court, which did not contain the subscription of the plaintiff or his attorney.

The court denied the motion, saying that as a copy was only required to be served for the purpose of apprising the defendant of the nature and particulars of the cause of action against him, the subscription of the complaint by the plaintiff or his attorney is, for such purpose, not a necessary part of the complaint.

On May 6, 1889, an amended complaint was filed, from which it appears that the plaintiff is a citizen of California and the defendant of Oregon; that the premises were "duly certified by final certificate to one G. C. Alexander, by the proper officers of the land department of United States, under the homestead laws of the same;" that thereafter the said Alexander duly conveyed the same to the plaintiff, who "is now the owner in fee-simple" of the premises and entitled to the possession thereof; that about January 1, 1889, the plaintiff was in possession of the premises as such owner, when "the defendant unlawfully and with force entered upon the same and ejected the plaintiff therefrom, and has ever since wrongfully withheld the possession thereof from the plaintiff."

To this complaint the defendant demurs, for that the same "does not state facts sufficient to constitute a cause of action."

On the argument, the only point made in support of the demurrer was, that it appears from the complaint, the plaintiff has not the legal title to the premises, the same being presumably in the United States, and, therefore, cannot maintain this action to recover possession of the same, citing, *Langdon v. Sherwood*, 124 U. S. 74, and cases there referred to.

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In reply, counsel for the plaintiff contends that an action to recover the possession of real property may be maintained on a prior possession against a mere intruder or trespasser, such as the defendant appears to be, citing, *Christy v. Scott*, 14 How. 282, and cases there referred to.

In the case cited by counsel for the demurrer, the plaintiff sought to maintain ejectment for certain lands in Nebraska as the mere assignee of a certificate of purchase of the same, issued by the local land officers at Omaha. It does not appear that he had ever been in the possession of the premises or been dis-seised thereof.

By the law of Nebraska, such certificate is made equivalent to a patent, as proof of title, against any one but the holder of the patent. But, notwithstanding this, the court held that ejectment cannot be maintained in the courts of the United States, for the possession of lands in that state or elsewhere, on such evidence.

In support of this conclusion the court cited *Bagnell v. Broderick*, 13 Peters, 436; *Fenn v. Holme*, 21 How. 481; *Hooper v. Scheimer*, 23 How. 235; and *Foster v. Mora*, 98 U. S. 425.

In *Bagnell v. Broderick*, *supra*, a case which came up from Missouri, where the legislature had enacted that ejectment might be maintained on a New Madrid location, the court held that the holder of a patent from the United States could maintain ejectment in the courts of the United States, against an occupant, claiming under such location.

The effect of this decision is simply, that in ejectment, the party having the highest evidence of the legal title must prevail; that the patent of the United States, as evidence of title, was superior to that of the location, and upon this point there can be but one opinion. The court divided on the question whether Bagnell, the occupant under the New Madrid location, could show in the action at law that the patent was issued to another in fraud of his rights, the majority holding that he could not. Yet Mr. Justice Catron, in speaking for the majority, said: "Nor do we doubt the power of the states to pass laws authorizing the purchasers of lands from the United States to prose-

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cute actions of ejectment upon certificates of purchase against trespassers on the lands purchased; but we deny that the states have any power to declare certificates of purchase of equal dignity with a patent. Congress alone can give them such effect.”

Fenn v. Holme, supra, was an action brought on a New Madrid location, which had neither been surveyed nor approved.

Hooper v. Scheimer, supra, was an action brought on an entry with the register and receiver to recover possession of certain lots in Little Rock, Arkansas, which the state had declared was sufficient evidence of title to support ejectment. The defendant claimed under a patent from the United States, which appearing valid on its face, the court held could not be contradicted or overcome by evidence *aliunde*, and must therefore prevail against the certificate of purchase.

In delivering the opinion of the court in the latter case, Mr. Justice Catron said, that ejectment cannot be maintained in the national courts against “a defendant in possession” on an entry made with a register and receiver; and Mr. Justice Daniel said, in *Fenn v. Holme, supra*, without qualification, that the plaintiff in ejectment cannot recover in ejectment without the legal title—the complete title. He seems to have labored under the impression, that, to allow the action to be maintained without such title, would in some way destroy the distinction between actions at law and suits in equity, contrary to the constitution and laws of the United States. But in this he was certainly mistaken.

Foster v. Mora, supra, was an action brought by a person claiming title to the Mission San Jaun Capistrano, under a patent from the United States, to recover possession of the same from parties who claimed under a confirmed Mexican grant on which a patent had not been issued.

The court simply held, that the legal title as evidenced by the patent must prevail, and if there were any equities in the case they could only be considered on the equity side of the court.

Now, there is neither decision nor *dictum*, unless it be that of Mr. Justice Daniel, in any of these cases against the right to maintain ejectment in any common-law court, state or national, on a prior possession, against a mere intruder or trespasser,

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whether such possession is claimed or held in pursuance of a purchase from the United States, on which a patent has not yet issued, or otherwise.

Nor can I see, and I say it with due deference, if a state provides that ejectment—an action at law to recover *the possession* of real property wrongfully withheld from the plaintiff therein—may be maintained on any evidence of title to or interest in the premises, from mere prior possession, to a patent under the seal of the United States, which shows a present right in the plaintiff to the possession, as against the defendant, how the character of the action is thereby changed or confounded or blended with a suit in equity.

An action at law is the acknowledged remedy for the recovery of the possession of real property wrongfully withheld from the plaintiff, or to recover damages for a trespass thereon; while a suit in equity is the proper remedy to compel a conveyance thereof, when wrongfully refused, or to establish or enforce a trust therein. If the legislature provides that the former may be maintained on any interest in the premises or right thereto, short of the strict legal title, from which it appears that the plaintiff is legally entitled to the possession, as against the defendant, it is none the less an action at law and in no sense a suit in equity. It is still a legal remedy for the redress of a wrong to a legal right—the right of possession. And under section 919 of the Revised Statutes, which conforms “the practice, pleadings, and modes of proceeding” in such cases in the national courts to those in the state courts, “as near as may be,” such state law will furnish the test of when and by whom such an action can be maintained.

Of course the state cannot say, even in its own courts, that a mere entry or certificate of purchase shall prevail as evidence of title over a patent, valid on its face. Such a law would, in my judgment, interfere with the exercise of the power to dispose of the public lands in an orderly and effective manner. But the state may provide, as Mr. Justice McLean well says in his dissenting opinion in *Bagnell v. Broderick*, 13 Peters, 443, that it may be shown in such case that the patent was fraudulently obtained, and is therefore null and void.

But this digression has already gone quite far enough.

The question in this case is simply this, can ejectment be maintained in this court on a prior possession against an intruder or trespasser?

The law of the state is (sec. 316, Comp. 1887), that “any person who has a legal estate in real property and a present right to the possession thereof may recover such possession, with damages for withholding the same, by an action at law.” This is substantially the common-law action of ejectment, minus its once useful fictions; and as I understand the law, is, by virtue of section 919 of the Revised Statutes, the rule of procedure in this court.

Possession or actual occupation of real property is in some degree a title to or estate therein. Blackstone, in his consideration of the titles to land, gives “naked possession” as the first. (2 Blackst. Com. 195.) And possession by the vendor is a sufficient interest in lands to carry the covenants in his deed to his assignee. (*Fields v. Squires*, 1 Deady, 388, and the cases there cited; 2 Washburn on Real Property, 493.)

In *Whitney v. Wright*, 15 Wend. 179, it was held, in the language of the syllabus: “A prior possession is sufficient to entitle a party to recover in an action of ejectment against a mere intruder or wrong-doer, or a person subsequently entering without lawful right, if the action be brought within a reasonable time.”

In *Jackson v. Boston & W. Ry. Corp.* 1 Cush. 575, it is said that, “if A enters on the land of B and takes possession, and afterwards C enters on A and dispossesses him, A may well maintain an action against C to recover possession, although his entry on B was without right and tortious; for mere possession is a good title against a stranger, having no title.”

In *Christy v. Scott*, 14 How. 282, the supreme court held, in the language of the syllabus: “A mere intruder cannot enter upon a person seised, eject him, and when sued question his title or set up an outstanding title in another; the prior peaceable possession of the plaintiff is enough to enable him to recover in ejectment against one having no title.”

The case came up from Texas. The plaintiff alleged that he

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was seised, possessed of certain real property, and that the defendant forcibly ejected him therefrom and kept him out of possession. The defendant answered that the plaintiff claimed under a certain grant, which he alleged was illegal. On demurrer, the court held this to be no defense to the action.

In disposing of the question, Mr. Justice Curtis, who delivered the opinion of the court, said: "According to the settled principles of the common law, this is not a defense to the action. The plaintiff says he was seised in fee, and the defendant ejected him from the possession. The defendant, not denying this, answers that if the plaintiff had any paper title, it was under a certain grant which was not valid. He shows no title whatever in himself. But a mere intruder cannot enter upon a person actually seised, and eject him, and then question his title, or set up an outstanding title in another. The maxim, that the plaintiff must recover on the strength of his own title, and not on the weakness of the defendant's, is applicable to all actions for the recovery of property. But if the plaintiff had actual prior possession of the land, this is strong enough to enable him to recover it from a mere trespasser, who entered without any title."

The seizure or possession of the plaintiff in this case is not that of a mere squatter or temporary occupant of the public lands. He is the vendee and assignee of a recognized settler on the premises, under the homestead law of the United States, to whom an official certificate was issued, to the effect that he had complied with the law and was entitled to a patent. The plaintiff is the beneficial owner of the property and was in the possession of the same, when the defendant entered without title or right.

Such a possession is sufficient, according to the rules of the common law and the statute of this state governing the procedure in this court, to enable the plaintiff to maintain this action against an intruder, as this defendant appears to be. Indeed, it would be a serious reproach to the administration of justice, if a citizen of another state was without remedy in this court for such a bare-faced trespass and wrong.

The demurrer is overruled.

SEPTEMBER 3, 1889.

DEADY, J. The defendant has answered. The answer contains specific denials of sundry allegations of the complaint, and also two defenses, each of which is styled therein "a further answer and defense," although there is but one answer containing these denials and defenses. (Comp. 1887, secs. 71, 72.)

The first defense is that at and prior to the entry of the premises by Alexander, the same was public land of the United States, and subject to entry under the homestead law, at Lakeview, Oregon; that prior to his settlement on the premises Alexander had acquired a quarter section of public land under said law in California, and was not entitled at the time of such entry, and the issue of said final certificate, to enter on or settle upon any of the public land under the homestead law; and that said entry and certificate are illegal and void,—of all which the plaintiff had notice before the date of the conveyance from Alexander.

The second defense is that the officers of the land office at Lakeview, Oregon, "having been informed," after the issue of the certificate to Alexander, that he had acquired a quarter section of land under the homestead law prior to his settlement on the premises, set aside and canceled said entry and certificate, and reported the facts to the commissioner of the general land office, who thereupon canceled said entry and certificate on April 27, 1879; that said Alexander was duly notified of said "proceeding" before said officers, and appeared and was heard therein; that about January 1, 1889, the defendant, "with the advice and consent" of the register and receiver, settled on the premises with the intention of claiming the same under the homestead law, he being qualified so to do, and "went into the peaceable possession of the same, and ever since has been and now is in possession of such land, as such settler, and is entitled to remain in the possession thereof in accordance with the provisions of said law and the regulation of the interior department, and within the time allowed by law he offered to file his homestead application and perfect his entry" in the land office at Lakeview; "and has been instructed and advised by the commissioner of the general land office to remain in possession of said

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land, as such settler; and that he was at the time of the commencement of this action, and ever since has been, and is now, in the possession of the land described in the complaint, under the authority and by the direction of the department of the interior and the commissioner of the general land office,”—of all which the plaintiff had notice at the time of the conveyance to him from Alexander. To these defenses a demurrer is interposed.

The second defense will be considered first. It admits by necessary implication that Alexander obtained the certificate for the land under the homestead act, by complying with the provisions thereof, including the payment of the price and the five years' residence and cultivation about February, 1886.

To avoid the effect of these facts it is alleged in the defense that the officers of the district land office, “having been informed” that Alexander had had the benefit of the homestead act, of their own motion instituted a “proceeding” to set aside and cancel said certificate on that account, which was done and reported to the commissioner, who, on their recommendation, affirmed their action.

It matters not what advice or direction was given the defendant by any officer of the land department concerning the possession of the premises. Neither of them had any power or authority to authorize or direct him to take possession of the land, and it is not credible that they even did so. If the law and the facts warranted him in taking possession of the premises, well and good, otherwise not. The fiat of an officer of the land department is not law, nor is this a government by Pasha.

I think this so-called “proceeding,” to cancel Alexander's entry and certificate, was an arbitrary and illegal one. There was no contest about the matter, which the law authorizes the register and receiver to hear and decide, subject to an appeal to the commissioner, and thence to the secretary of the interior. When the certificate had issued without objection, the time for a contest had passed. Upon its issue the land became the property of Alexander, and he was entitled to the patent therefor. Such a right cannot be arbitrarily set aside, canceled, and avoided by the land department, in a “proceeding” self-instituted, on mere hearsay.

Nor does it signify that the party had notice of the “proceeding” and took part in it. One may defend one’s life or property when it is attacked without acknowledging the legality of the attack or “proceeding,” or being bound by the result of it.

If Alexander was not entitled to make the entry for the reason that he had already had the benefit of the act, the certificate may be set aside on that ground in the courts where the matter may be heard and determined, according to the law applicable to the rights of individuals under like circumstances. (*Smith v. Ewing*, 11 Sawy. 56.)

In this case I had occasion to consider this question of the power of the land department of its own motion to recall, set aside, or cancel a certificate of purchase of public lands, regularly issued and valid on its face, and concluded that it did not exist. It was there held (p. 65): “The right of a party holding a certificate of purchase of public land, and that of his grantor, is a right in and to property, of which neither of these can nor ought to be deprived without due process of law.”

Since the decision of this case, *Cornelius v. Kessel*, 128 U. S. 456, has been decided by the supreme court. The general drift of the opinion is to limit and restrain the power of the commissioner of the general land office to set aside or cancel entries or certificates, allowed by the register and receiver. The pith of the opinion on this point is stated in one of the syllabi as follows:—

“The power of supervision possessed by the commissioner of the general land office over the acts of the register and receiver of the local land offices is not unlimited or arbitrary, but can only be exerted when an entry is made upon false testimony, or without authority of law; and cannot be exercised so as to deprive a person of land lawfully entered and paid for.”

All applications for entries of land under the homestead act are noted on the books and plats of the district land office, and a register kept of the same. These facts, “together with the proof upon which they have been founded,” are returned to the general land office. (Rev. Stats. sec. 2295.) When it appears from such return, together with the record of the surveys of the public lands, and the prior disposition thereof in the general

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land office, that an entry has been allowed in the district land office contrary to law, the commissioner has power, and it is his duty to correct the error and disallow the entry.

But, if after the entry is made and the certificate is issued, some one should offer to enter the same land on the ground that the first entry is illegal, and propose to show the same by new and extraneous proof, I can find no law that authorizes the register and receiver, or the commissioner, to institute or direct a "proceeding," to hear and determine the matter, and therein set aside or cancel the entry and certificate. The subject is no longer administrative in its character. It ceased to be so, so far as the register and receiver are concerned, when, upon the final proof, after notice to the world, of the settler's five years' residence and cultivation, the certificate was issued to him.

Admitting the power of the commissioner to disallow an entry for reasons appearing on the face of the return, made by the register and receiver concerning the same, thereafter and otherwise, the validity and effect of the certificate, as evidence of the right of the settler to the land described therein, can only be impeached in a judicial proceeding.

If upon inquiry the land office finds that through fraud or mistake a certificate was improperly issued, a suit should be brought in the proper court to set aside and cancel the same. Such a suit is quite as simple and inexpensive as a hearing in the land department, and much more likely to be attended with correct and satisfactory results.

The allegation in this defense, that the defendant took peaceable possession of the premises, and still holds them so, amounts, under the circumstances, to nothing more than an admission that the defendant entered upon the possession of the premises, but without force or violence, and still holds them so. This is not an action of forcible entry and detainer, and although the complaint alleges that the defendant entered "unlawfully and with force," proof of an unlawful entry and holding will support the action.

The demurrer to this defense is sustained.

The first defense consists simply of the allegation that Alexander, by reason of his having had the benefit of the homestead

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act, was not entitled to settle upon and acquire the title to the premises under said act.

This defense, also, by a necessary implication, admits that Alexander acquired the possession of the land under the homestead act, in the manner therein provided, and that the defendant, without even a claim of right, title, or interest in the premises, entered thereon and deprived the plaintiff of the possession thereof, as alleged in the complaint.

The demurrer to this defense is also sustained.

UNITED STATES v. TERRY ET AL.

DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA.

MAY 24, 1889.

1. **INDICTMENT AND INFORMATION — PLEA IN ABATEMENT — DEMURRER.** — Where a plea in abatement to an indictment alleges facts contrary to the record, or which could be proven only by the testimony of the grand jurors disclosing their proceedings or impeaching their findings, a demurrer to the plea cannot be regarded as admitting the truth of such allegations, but will be considered as an objection or exception to the filing or allowance of the plea.
2. **IDEM — IMPEACHING RECORD BY PLEA.** — Such allegations cannot properly be inquired into by plea in abatement, but the inquiry must be addressed to the discretion of the court, by suggestion or motion, and it will be allowed only in rare and extraordinary cases, where the matters, if true, work a manifest and substantial injury to the defendant.
3. **IDEM — CONDUCT OF GRAND JURY — OMISSION TO READ INDICTMENT.** — The fact that after a large number of witnesses had been examined by the grand jury, and the district attorney had been instructed to prepare indictments against defendants, the jury dispensed with the reading of the indictments, and returned them into court without knowing their exact contents, because of the statement made to them by the attorney that it would take three hours to read them, and that the supreme court justice wanted to leave, and wanted the indictments found before he left, affords no ground for setting aside the indictments.
4. **IDEM — PRESENCE OF THE DISTRICT ATTORNEY IN THE JURY-ROOM.** — In the United States district court the mere fact that the district attorney was present during the expression of opinion of the grand jury upon the charge in the indictment, and during their voting thereon, is at most an irregularity, which, in the absence of averment of injury or prejudice to defendant, is a matter of form and not of substance.
5. **IDEM — REFUSAL TO SUBPOENA WITNESSES FOR ACCUSED.** — In the United States district court the mere refusal of the district attorney to summon witnesses for the accused, at the request of the grand jury, furnishes no ground for setting aside the indictment.

Before HOFFMAN, District Judge.

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Indictments against D. S. Terry for an assault with a deadly weapon, attempting to obstruct justice, obstructing United States marshal, and displaying deadly weapon in a threatening manner. Also against Sarah A. Terry for attempting to obstruct justice and obstructing United States marshal. On demurrer to plea in abatement.

Mr. John T. Carey, United States attorney.

Mr. David Louderback, special counsel for United States.

Mr. Patrick Reddy, *Mr. W. T. Baggett*, and *Mr. W. W. Foote*, for defendants.

HOFFMAN, J. The first four articles of the plea were abandoned at the hearing. It is urged in support of the remaining articles that the matter therein set up show, if true, that the indictment was not legally found by the grand jury, and that the suit must, therefore, abate.

It is further urged that the demurrer admits, for the purpose of this argument, the truth of the matters so alleged.

The district attorney contends:—

First—That the plea alleges matters contrary to the record, and therefore that the truth of those matters cannot be inquired into, and

Second—That the inquiry can from its own nature be made only by taking the testimony of the grand jurors, who by law and the terms of their oaths are forbidden to disclose their proceedings or to impeach their finding.

It would seem that the more regular course would have been to object to the allowance of the plea. The court would have ruled it out as a formal plea in abatement, for a plea of that character is bad so far as it contradicts the record. At common law the regular answer would be that the indictment was duly returned by a grand jury *prout patet per recordum*, and this must be tried by an inspection of the record itself. (6 Coke, 53; 3 Blackst. Com. 331; 1 Bishop on Criminal Law, sec. 885, and cases cited; *State v. Hamlin*, 47 Conn. 116; *Commonw. v. Smith*, 9 Mass. 110.)

So, also, if the allegations of the plea cannot be proved except by the testimony of the grand jurors themselves. (*State v. Hamlin, vide supra.*)

The demurrer, therefore, in this case can only be allowed to operate as an objection or exception to the filing or allowance of the plea. It cannot be taken as an admission of the truth of the allegations pleaded. No such admission was intended by the district attorney, nor had he authority to make it.

These observations may seem to savor of technicality. They will be found, however, to be not without importance to the final decision of the questions argued at the hearing.

Assuming, however, that the plea in the case is open to exception as a formal plea in abatement, it does not follow that the defendant is without remedy.

Thus, for example, where it is alleged that there has been improper conduct on the part of officers employed in the designating, summoning, and retaining of the grand jury, the defendant, who may have been prejudiced thereby, may bring the matter before the court by suggestions, or motion, or affidavit, even where no right of challenge to the array is allowed by law. But this motion is addressed to the discretion of the court, and the court having general power to preserve the pure administration of justice, will freely exercise its sound discretion for the purpose of serving that end. (Per Nelson, J., *United States v. Reid*, 2 Blatchf. 449.)

To the attainment of this great object for which courts are established, general rules or doctrines must in some cases give way; but exceptions to their application must be admitted with extreme caution, and on the clearest ground of their necessity to secure substantial, and not merely technical rights. Thus it is the policy of the law that the preliminary inquiry by a grand jury as to the guilt or innocence of the accused party should be secretly conducted. And in furtherance of this object the juror is sworn to secrecy. And yet in cases of alleged perjury, or to impeach or contradict a witness in a criminal, or perhaps in a civil case, the grand juror may disclose the testimony given before the jury.

So again, the general rule that the admissibility and suf-

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ficiency of the evidence on which an indictment has been found cannot be inquired into, is unquestionable. Yet if, for example, it should appear from the indorsement on the back of the indictment that only one witness was examined, and it should be shown that he was a convicted felon, and, therefore, incompetent to be a witness in any case, I presume that the indictment would be quashed.

It has also been held that in extreme cases, "when the court can see that the finding of the jury is based upon such utterly insufficient evidence or such palpably incompetent evidence as to indicate that the indictment resulted from prejudice, or was found in wilful disregard of the rights of the accused," it will interfere and quash the indictment. (*United States v. Farrington*, 5 Fed. Rep. 343.)

On the other hand, many authorities can be cited to show that the court will under no circumstances inquire into the character of the evidence on which the indictment was found, the presentment of the indictment, duly indorsed, being held conclusive of the regularity of the proceedings.

Whether an objection that the bill was found by a less number than twelve, was said by Mr. Justice Nelson to be doubtful under the authorities.

It is evident that the inquiry thus raised is open to technical objections:—

First—That it would require the juror to reveal his own vote and that of his fellows.

Second—It would contradict the record which shows that the indictment was "a true bill," i. e., found by the requisite number of jurors. (*United States v. Reid*, 2 Blatchf. 435–466; 1 Sawy. 531; *People v. Hulbut*, 4 Denio, 133; 47 Am. Dec. 244; *Voorhees v. Kellogg*, 2 Hill, 288; *State v. Fowler*, 52 Iowa, 103; *Stewart v. State*, 24 Ind. 142; *Creek v. State*, 24 Ind. 151; 16 Com. B. 467.)

But it has been held that the testimony of grand jurors may be received to show that under a misapprehension of the law the indictment was found on a majority vote of the jury and without the concurrence of twelve of the number, and that therefore it was void and no true bill; and, secondly, that the

court, while recognizing the absolute verity which a regular judicial record imports and the policy on which the rule is founded, yet holds that there always has been and always must be, from the necessities of the case, a power in the court to vacate or cause to be amended a record which has been erroneously or falsely made, by inadvertency or otherwise, by any of its officers; and that it is competent for it to say, if the claims of justice require it: "This is not our record; it is false and erroneous, and the authentication it bears is unauthorized and unwarranted." (*Low's Case*, 4 Greenl. 444, 445; 2 Hawkins, Pl. Cr. ch. 25, sec. 15; *Commonw. v. Smith*, 9 Mass. 107.)

Professor Greenleaf adds the great weight of his authority to the doctrine announced in these cases, but he is careful to limit his statement to the points actually decided, viz.: "That grand jurors may be asked whether twelve of their number actually concurred in the finding of a bill, the certificate of the foreman not being conclusive evidence of the fact." (1 Greenleaf on Evidence, sec. 252.)

Assuming this statement of the law to be correct, we perceive that it introduces exceptions to well-settled and fundamental rules, which the courts uniformly declare to be salutary, and in general indispensable to the administration of justice.

It is not surprising that the courts have in many instances refused to sanction so great a departure from established rules, and that the question should still, as observed by Mr. Justice Nelson, be doubtful.

In *Low's Case*, *supra*, the court seems to be fully alive to the danger of allowing the exception contended for.

"It may be said," observes the court, "that to permit an inquiry of this sort would open the door to great abuses; that it would afford opportunity to tamper with the jury; and that it would lessen the respect due to the forms and solemnities of judicial proceedings. These are considerations which address themselves strongly to the attention of the court. It could only be in a *very clear case*, where it could be made to appear *manifestly* and *beyond* a reasonable doubt that an indictment apparently legal and formal had not in fact the sanctions which the law and the constitution require, that the court would sustain

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a motion to quash or dismiss it upon a suggestion of this kind.”

From the foregoing it results:—

First—That matters which contradict the record, or which are, if true, only provable by testimony of the jurors, who must be permitted to disclose what their terms of the oath and the general rules of law requires them to keep secret, and the effect of which is to impeach their verdict, cannot be set up in a formal plea in abatement.

Second—If they can be inquired into at all, it must be on a suggestion or motion addressed to the discretion of the court.

That an exception to the general rules of law, which forbid a record to be contradicted, a grand juror to disclose the proceedings of the jury or to impeach its findings will only be allowed in rare and extraordinary cases, and where the matters, if true, worked a manifest and substantial injury to the defendant, which the court in the interest of justice is bound to redress.

That the facts contradicting the record must be “made out to the entire satisfaction of the court, so as to leave no doubt on the subject.” (Per Preble, J., *Low's Case*, 4 Greenl. 453.)

That the facts, if true, must present a case, not of technical, or possible, or hypothetical, but of manifest and undeniable wrong to the defendant, such as putting him to trial on an indictment not found by twelve jurors, and which is therefore no indictment, but an accusation made by an unauthorized body of men.

Treating, then, the allegations of the plea as suggestions made to the court on an application addressed to its discretion, or its authority to remedy abuses by its officers, which would work a manifest and substantial wrong to the defendant, I proceed to consider those allegations which were relied on at the hearing.

The fourth article of the plea alleges in substance that the indictment was not found or concurred in by twelve of the grand jurors.

The facts on which this averment is made are stated in the succeeding article:—

Article 5 alleges that the indictment was wrongfully and fraudulently brought into and presented to the court, because,

as defendant is informed and believes, the said indictment was never read to the grand jury, or its contents made known to them, or any of them; that four charges were under consideration by the grand jury; that four indictments in form were prepared by the district attorney, which were brought by him into the grand jury room; and that he then and there told the grand jury that they should hurry up with those indictments against defendant, because Mr. Justice FIELD wanted to leave, and wanted them found before he left; that thereupon the grand jury asked the district attorney how long it would take to read the indictments against the defendants, and he replied, "About three hours"; and thereupon the said grand jury, in the presence of the said district attorney, agreed, together, to dispense with the reading of said indictments, including the indictment in this action, and to present the same to the court without reading or hearing read any of said indictments, or any part of either one of said indictments; and all and each of said indictments were thereafter returned into and presented to the court by the said grand jury without ever having been read by or to said supposed grand jury, or any member thereof; and that prior to the presenting and filing of said indictments the said grand jury never knew and had no knowledge of the contents of the indictments in this action, and never knew what crime or offense, if any, was charged therein against this defendant.

It is upon the facts stated in this narrative of what took place in the grand jury room that the defendant relies to justify the averment that the indictment "was wrongfully and fraudulently presented to the court" by the grand jury, and that the grand jury "never knew what crime or offense, if any, was charged therein against said defendant."

It is not averred in the plea that the alleged communication to the grand jury of Mr. Justice FIELD's wishes induced them to find an indictment against the defendant which would not otherwise have been found. Such an impeachment on their intelligence, their integrity, and their independence the pleader has not ventured to make. Supposing, however, the communication of Mr. Justice FIELD's wishes to have been actually made to and believed by the jury, the most that can be said is

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that by possibility it might have influenced them. To set aside an indictment because the jury are informed that one or more persons eminent for their official position or their social standing, or that a considerable number of their fellow-citizens or of the public journals desire an indictment to be found, would be to adopt a rule which would in very many cases prevent the finding of any indictment whatever.

But the averments in the plea present no such case. All that can be gathered or inferred from them is that the grand jury were induced, by the alleged wishes of Mr. Justice FIELD and the statement by the district attorney that it would take three hours to read the indictments, to dispense with the reading of them.

The usual, and I believe invariable method of procedure in cases submitted to grand juries in this court, must, in the absence of any averment or suggestions to the contrary, be presumed to have been followed.

The district attorney informs the grand jury of the nature of the charge, and calls their attention to the provisions of the statutes supposed to have been violated. The witnesses are then produced and examined, and it is only when the jury is satisfied that the offense has been committed by the accused that the district attorney is directed to prepare the formal indictment. This case was, therefore, passed upon, and the bill substantially though not technically and formally found, before the alleged communication to the grand jury of the alleged wishes of Mr. Justice FIELD was made to them.

The jury saw fit to dispense with the reading of the indictments, presuming, as they had a right to do, that the district attorney had in framing the bills obeyed their directions. No imputation is cast, either by averment or suggestion at the bar, upon the fairness, high sense of duty, or capacity of that officer.

Neither the intelligence nor the integrity of the jury is impeached except by the use of the word "fraudulent" (probably through inadvertence) with respect to the presentment of the indictment to the court.

The indictment shows that no less than seventeen witnesses were examined by the jury. It decided on their testimony to

sustain the charge and directed the indictment to be prepared. When the indictment was brought in to them the nature of the offense charged was apparent from the indorsement upon it.

They might not have known what was alleged in all the counts, but how can it be said that “they never knew what crime or offense, if any, was charged therein against the defendant?”

No case has been cited, nor can any, I believe, be found where the court on a state of facts like this has allowed a record to be contradicted by the evidence of grand jurors impeaching their own finding. And this on an application addressed to the discretion of the court, which must be “satisfied beyond a reasonable doubt” that a legal or constitutional right has been violated, and that manifest injustice and injury to the defendant have been done.

If an indictment duly presented to the court with the concurrence or acquiescence of the grand jury can be set aside on the testimony of one or more of them that he was ignorant of its contents (or of the particular allegations in one or more of the counts), because it was not read to him, not that he demanded its reading and it was refused, but that he with his fellows dispensed with the reading, or that if read he through illness, weariness, preoccupation, or other causes did not hear or understand its contents, and that if he had he would not have concurred in finding it, or some of the counts contained in it, every indictment would be at the mercy of grand jurors who might be willing or be induced to give such testimony.

The testimony of even trial jurors, whose verdicts if adverse are convictions and not merely accusations, is not received to impeach their verdict.

Upon grounds of public policy the courts have almost universally agreed upon the rule that no affidavit, deposition, or other sworn statement of a juror will be received to impeach the verdict. (Thompson and Merriam on Juries, sec. 440.) For this familiar rule a great number of cases are cited by the learned authors.

Thus it is not admissible to show by the oath of a juror that he did not agree to the verdict as rendered, or that he consented

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to the return of it without concurring in it, in order to secure his discharge, or because his health required him to be released from confinement. Nor will such testimony be received to show that the jury did not in fact agree upon the verdict, or that the verdict rendered was not in fact the verdict of particular jurors, or that the verdict was by mistake returned as the verdict of the whole jury, when some of them in fact were in favor of finding it for the other party, or that they misunderstood the charge of the court or the result of the finding, or that they agreed upon the verdict by average or by lot. (Thompson and Merriam on Juries, secs. 440, 441, 442, and cases cited.)

And it is observed by the authors of the work just cited that "the last thing a court will listen to is an affidavit of a juror contradicting the verdict which he has solemnly rendered in open court under the obligation of his oath as a juror. If he does not agree to the verdict when it is announced in court he must speak then, or afterwards hold his peace." (Thompson and Merriam on Juries, p. 542, in note.)

The sixth article alleges that "the district attorney was present during the expression of opinion of the grand jury upon the charge made in said indictment, and during the expression of their opinions and the giving of the votes thereon."

It is not alleged or suggested that the district attorney exercised or attempted to exercise any influence upon the grand jury to induce them to find a bill.

Whether he was present when the jury voted that he should be instructed to prepare a bill, or afterward when the bill was presented to them and voted on, or on both occasions, does not distinctly appear.

It seems that in England it is not unusual for the public prosecutor to remain with the grand jury while they are deliberating upon or deciding any question of finding a bill. (1 Chitty, 317.)

The district attorney was necessarily present at the expression of their opinion when they instructed him to prepare the indictment.

Section 925 of the Penal Code of this state provides that no person must be permitted to be present during the expression

of their (the grand jurors) opinions, or giving their votes upon any matter before them, and if so present during the session of the grand jury, and when the charge embraced in the indictment is under consideration, the indictment must be set aside. This language would include the case of a porter or servant called in to make a fire or light the gas, whose presence could have had no conceivable influence on the action of the jury. If, as in this case, the unauthorized person whose presence is supposed to vitiate the indictment be the district attorney, that consequence must flow as a conclusive, legal presumption that the grand jurors have been so weak and so unmindful of their duty as to have been induced, by the mere presence of the district attorney, to find a bill which they would or might otherwise have ignored.

A presumption so derogatory to the character and intelligence of the jury no court, unless compelled by positive statute, should entertain.

The provisions of the Penal Code of California are not binding on the federal tribunals, and they can have but little force as a rule necessary in the opinion of the legislature for the protection of the accused, when the state law allows any person charged with crime, even the highest, to be brought to trial on an information filed and subscribed by the district attorney without the intervention of a grand jury. (Penal Code Cal. sec. 809.)

The United States statutes contain no such provision. The mere presence of the district attorney when the voting takes place is at most an irregularity, which, when there is no proof or averment of injury or prejudice of the defendant, is a matter of form and not of substance within the scope of section 1025, United States Revised Statutes. (*United States v. Lusk*, 14 Blatchf. 455; *United States v. Ambrose*, 3 Fed. Rep. 283.)

The seventh and eighth articles allege that the grand jury, though requested, refused to hear certain witnesses for the defendant. It is enough to say that an accused person has no right to appear in person or by counsel before the grand jury, or to have witnesses in his behalf produced and examined.

The only portion of the ninth article necessary to be consid-

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ered is the allegation that the grand jury requested the district attorney to subpoena certain witnesses in behalf of the defense, which the district attorney refused to do, and instructed the grand jury that no witnesses for the defense should be subpoenaed, called, or heard before the said grand jury, and that such were the instructions of the judges in bank; and that he refused on the same ground a similar request made to him by the defendant's attorney.

The district attorney was clearly right if he merely informed the grand jurors that as a general rule the defendant had no right to produce witnesses in his defense, nor had they any right to hear them. In other words, that the proceedings were *ex parte* and not a trial of the case, the general rule being that the grand jury are to hear evidence only in support of the charge, and not in exculpation of the defendant. (Hale P. C. 137; 2 Hawk. P. C. 25, sec. 245, n.; Add. Pa. R. app. 28; *Lung's Case*, 1 Conn. 428; 1 Dall. 255; 2 Cranch C. C. 11; *United States v. Foster*, 35 Ga. 339.)

In the last case, Erskine, J., observes: "To allow evidence, either oral or written, to go before the grand inquest on behalf of the defendant would be subversive of the ancient and well-settled rules of courts of justice."

The policy of this rule has been explained and vindicated with great force by Addison, J. (Addison's R. *ubi supra*), and by Kean, C. J., in *Republica v. Shaffer*, 1 Dall. 236.

But its seeming hardness has led to some qualification of it. Thus the right to send witnesses for the defense to the grand jury *with the consent of the prosecuting attorney*, but not without it, appears to be recognized by that great judge, Washington, in *United States v. White*, 2 Wash. C. C. 29, 30.

On this point Mr. Chitty observes that "*prima facie* the grand jury have no concern with any testimony but that which is regularly offered to them with the bill of indictment, . . . their duty being merely to inquire whether there be sufficient ground for putting the accused party on his trial before another jury of a different description. But if they are unable to satisfy themselves of the truth sufficiently to warrant their determination, they may properly seek other information relative to

mere facts, but further than this they cannot proceed.” (1 Chitty’s Cr. L. 318.)

In accordance with this view Mr. Justice FIELD charged a grand jury of the circuit court as follows:—

“You will receive *all the evidence presented* which may throw light on the matter under consideration, whether it tend to establish the innocence or guilt of the accused. And more: *If in the course of your inquiries* you have reason to believe that there is other evidence within your reach which would qualify or explain away the charge under investigation, it will be your duty to order such evidence to be produced.” (2 Sawy. 670.)

Legislative provisions substantially similar to the instructions given by Mr. Justice FIELD in the last sentence of his charge have been adopted in California, New York, and several other states.

The diligence of the district attorney has failed to find any judicial decision in which the construction, application, and effect of these statutes have been construed.

Whether the order to the district attorney to produce further testimony is to be made by the unanimous vote of the jury or by a majority of those investigating the charge, or by at least twelve of the body; whether their belief that further evidence would qualify or explain away the charge is to be founded exclusively on a consideration of the evidence already produced, or upon suggestions of outside parties; whether the bare refusal of the district attorney to obey the orders of the grand jury will, *per se*, and without giving him an opportunity to explain his reasons therefor or the circumstances of the case, vitiate the indictment,—are questions upon which judicial decisions throw no light.

It is to be observed, however, that neither in California nor in any of the states that have adopted this rule has such refusal been declared a statutory ground for setting aside the indictment. No adjudged case has been cited in any federal court where this relaxation or modification of the common-law rule has been recognized or adopted. That its adoption might lead to serious evils is apparent.

The grand jury is necessarily left to be the sole judges,

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whether there is “reason to believe that other evidence not presented *would* qualify or explain away the charge.”

If testimony contradictory or in rebuttal of the evidence before them is to be received, the district attorney must be at liberty to show that the witnesses produced are from their general reputation unworthy of belief, or that they have given a different account of the circumstances to which they testify; or, by proving an *alibi*, to show that they could not have been present at the occurrences to which they testify. This evidence the defendant should in turn have the right to rebut, and thus the grand jury would practically enter upon the trial of the case—a proceeding “subversive of the ancient and well-settled rules of the courts of justice.”

If the doctrine, that it is the right and duty of grand juries to hear without the consent of the prosecuting attorney witnesses for the defense, shall be incorporated into the federal jurisprudence in criminal cases, it must, I think, be restricted in its application to cases where the evidence already produced fails “to satisfy the jury of the truth sufficiently to warrant their determination.” (Chitty’s Cr. L. *ubi supra*.) And where *from that evidence* they believe that other testimony is attainable, not to rebut and disprove the evidence already adduced, but consistently with the substantial truth of the latter, will explain away or qualify the charge.

Such, I think, is the true construction to be given to the language of Mr. Justice FIELD, and to have been his meaning in giving his instructions.

If the district attorney in the case supposed declines to summon the witnesses the jury may apply to the court, or if they are led to believe that such application would be useless, they may refuse to find the indictment.

But *if* they find and duly present the bill to the court, that fact shows that (unless they have violated their duty and their oaths) the evidence before them has been sufficient to satisfy them of the truth of the charge, and that the case in which they would be entitled to call for further evidence has not arisen.

Certainly, in the absence of all judicial authority and precedent, I shall not be the first to go beyond the provisions of any

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of the Penal Codes of the states which have adopted the rule under consideration, by deciding that the mere refusal of the district attorney to summon witnesses for the defense at the request of the grand jury is a good ground for setting aside the indictment.

On the whole case it may, I think, be justly said that while the rigorous and apparently harsh, though ancient and well-settled rules of the common law, have in some instances been departed from, it has always been in the interest of substantial justice and to prevent a manifest wrong to the defendant.

And conversely where it is plain that substantial justice will not be promoted nor a manifest wrong to the defendant prevented, the indictment should not be set aside on grounds of technical errors, informalities, or irregularities.

Such I believe to have been the intention of Congress in enacting section 1025 of the Revised Statutes.

In his chapter relating to the proceedings of grand juries, Mr. Bishop observes: "We come now to a class of questions which are not surpassed by any other in point of practical difficulty. The authorities appear at the first impression to be almost as conflicting as the cases are numerous, and when we seek to reconcile, or to choose between them by a recurrence to the principles of law, we find it difficult to say that in a matter of mere practice, principle points in one direction rather than in another."

The difficulties here alluded to illustrate the perpetually recurring conflict between the conservatism or inflexible opposition to change, with which our profession is often reproached, and the spirit which regards innovation as equivalent to reform and change, synonymous with progress.

This conflict of opinion is greatly a matter of personal temperament, and while on the one hand obstinate conservatism may lead to a bigoted adherence to rules because they are ancient, the opposite spirit may lead to crude legislation, and sometimes to hasty decisions, where judges, impressed with the harshness of particular cases, are led to violate ancient, and on the whole beneficial rules. The history of the evolution of jurisprudence in England and in this country is replete with instances of the stubborn opposition with which reforms in law, even the most salutary, or modifications of ancient rules, the most indispensable, have been resisted by eminent members of the profession. On the other hand, the legislation of our states, and sometimes, perhaps, the decisions of the courts, disclose a rash and equally dangerous spirit of innovation. Of the former class may be mentioned the opposition made to the legal reforms introduced at various times by Lord Brougham and others into the legislation of England; the long contest between the courts of equity and common law, resulting in the triumph of the former, respecting the true nature of a mortgage, and the rights of a mortgagor and the mortgagee; the resistance with which the introduction into the jurisprudence of England of the rules of the *lex mercatoria*, or the customs of merchants encountered at the hands of the more bigoted disciples of the common law.

1. On the other hand, the statutory innovations upon the ancient rules respecting

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indictments and proceedings of grand juries have been in some cases crude, and productive of evil results. The provisions of our own statute, already noticed, which declare that an indictment shall be set aside if the district attorney is present when the vote upon it is taken, while the same law provides that he may bring to trial any person who has been held to answer by a committing magistrate upon an information filed by himself, without the intervention of a grand jury, present an illustration of the contradictory, if not absurd, legislation which has sometimes been adopted. The rule, too, under which a grand jury may, after indictment found, be examined upon *voir dire* as to their qualifications, bias, etc., by an accused person, who had not previously been held to answer, introduces a novelty in practice leading to delays and obstructions to the administration of justice, and which seems anomalous when we consider that by the law of the country from which we derive that venerable institution, the grand jury might find a bill upon the knowledge of one or more of its number. The obstinacy with which ancient rules have been adhered to in the construction of indictments presents, on the other hand, an instance of the stubborn adherence of judges and courts to precedents, which have lost, if they ever possessed it, any claim to adoption as practical rules in the administration of justice. Thus, if one be accused of the larceny of a horse, and it is alleged to have been a black horse, if the proof shows it to be a gray horse, the variance is fatal. Yet the pleader may allege, in several counts, where only one offense has been committed, several larcenies of a black or gray or brown horse, and the indictment is good, and this though the theory of the indictment is to give to the prisoner accurate and precise information of the crime with which he is charged. So it is fatal to an indictment if time and place be not alleged for every material averment; and yet when so alleged the prosecution is not obliged to prove the time as laid, but may prove the offense to have been committed at any time within the statute of limitations, and prior to the finding of the indictment. So, too, if an averment in an indictment is in the alternative or disjunctive, and the word "or" is used instead of "and," the defect is fatal, and yet in different counts he may vary the terms of the charge, producing the same result as if in the original averment he had been allowed to make the charge in the alternative. These rules, which the courts do not feel themselves at liberty to depart from, seem to savor of scholastic subtlety, and over-refinement. They probably owe their origin to a revolt of the humanity and sense of justice of the courts against the barbarism of a Draconian Code, upon nearly every page of which the scaffold could be seen, and which punished with the highest penalties of the law trivial and almost venial offenses. There seems to be now no reason, when such cruel laws no longer prevail, either in England or this country, that these ancient precedents should be adhered to. What is the true *via media* between stubborn adherence to ancient rules and a rash spirit of innovation, it is not always easy to discover or define; but if the rules suggested in the foregoing opinion, to the effect that while salutary and established rules or principles should be in general adhered to, yet the court in particular cases, in its discretion, may relax or introduce exceptions to the rule where substantial justice manifestly requires it, perhaps the practical administration of the criminal law will in some respects cease to deserve the reproaches of uncertainty and inefficiency which are now so freely made against it.

Points decided.

[May,

UNITED STATES *v.* SOUTHERN PAC. R. Co. ET AL. (three cases). SAME *v.* COLTON MARBLE AND LIME Co. ET AL.

CIRCUIT COURT, SOUTHERN DISTRICT OF CALIFORNIA.

MAY 27, 1889.

1. PUBLIC LANDS—DONATIONS—RAILROAD COMPANIES.—The act of Congress of July 27, 1866, granted to the A. & P. Co. every alternate section of public land by odd numbers to the amount of ten sections on each side of the road, wherever it might pass through a state. If any of these sections should be already granted, reserved, etc., before the map of the proposed route should be filed, other odd sections might be selected in lieu thereof within ten miles on either side of the limits so granted. Whenever and as often as a portion of the road twenty-five miles long should be completed, patents were to issue for the lands so granted, opposite to and coterminous with the portion or portions completed. The odd sections so granted were withdrawn from entry, etc. By section 18 the S. P. Co. was granted the same amount of lands, under similar restrictions, and it was provided that neither the present nor prospective rights of the A. & P. Co. should be thereby impaired. *Held*, that only the odd sections in the strip absolutely granted, and not those in the indemnity strip, were withdrawn from the public domain, and that the A. & P. Co., not having complied with the conditions of the grant, had neither a present nor prospective right to any lands in the last-mentioned strip, which were therefore still subject to grant.
2. *IDEM.*—The act of Congress of March 3, 1871, granted certain lands to the S. P. Co., to aid it in the construction of a branch line, and provided that if its route, when designated, should be found to be on the line of another road to which land had also been granted, the amount theretofore granted should be deducted from the quantity thereby granted to the S. P. Co., so far as their routes should be on the same general line. The map of the route of the A. & P. Co. was afterwards filed, and the routes of both roads were for some distance on the same general line. The S. P. Co.'s route included in its ten-mile limit part of the indemnity strip of the A. & P. Co., at points where the A. & P. Co. would have had the right to make selections of lands in lieu of others already taken up. *Held*, that the S. P. Co. acquired no rights as to lands in said indemnity strip so far as the two routes were on the same general line.
3. *IDEM*—MEXICAN GRANTS.—Lands claimed to be included in a Mexican grant of a specific boundary, which grant was *sub judice* at the time of the grant of March 3, 1871, were not public land at that date, and did not pass by the grant, though they were afterwards held not to be embraced by the Mexican grant.
4. *IDEM*—RELIEF AGAINST MISTAKE—LIMITATION OF ACTIONS.—A bill filed by the United States as real and not merely nominal complainant, to repeal patents improperly issued, is not barred by the statute of limitations or by laches.

Before Ross, District Judge.

In equity. Bill to repeal patents.

Mr. George J. Denis, United States District Attorney, and
Mr. Joseph H. Cull, Special Assistant United States District
Attorney, for complainants.

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Mr. Joseph D. Redding, Mr. J. D. Bicknell, Messrs. Anderson, Fitzgerald & Anderson, Mr. W. D. Gould, Mr. Edwin Baxter, Mr. J. L. Murphey, and Mr. J. S. Chapman, for defendants.

Ross, J. By the bill filed in this case the United States seek to annul certain patents issued by them to the Southern Pacific Railroad Company on March 29, 1876, April 4, 1879, and December 27, 1883, respectively, for lands situated in Los Angeles County, California, and to quiet complainants' alleged title thereto. To the bill, as amended, demurrers have been interposed which raise the question of the sufficiency of the matters alleged to entitle the complainants to the relief sought. The allegations, in substance, are that Congress, by an act approved July 27, 1866, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the states of Missouri and Arkansas to the Pacific Coast," granted to the Atlantic and Pacific Railroad Company, for the purpose of aiding in the construction of said railroad, etc., "every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is designated by a plat thereof filed in the office of the commissioner of the general land office, and whenever prior to said time any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the secretary of the interior, in alternate sections and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections, and not including the reserved numbers; *provided*, that if said route shall be found upon the line of any other railroad route, to aid in the construction of which lands have heretofore been granted by the United States,

as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act.” That by section 4 of the same act it is provided that whenever said Atlantic and Pacific Company shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the President shall appoint three commissioners to examine the same, and if it shall appear that twenty-five consecutive miles of the road and telegraph line have been completed as required by the act, the commissioners shall so report to the President, and patents shall be issued to said company, confirming thereto “the right and title to said lands situated opposite to and co-terminous with said completed section of said road;” and that from time to time, whenever twenty-five additional consecutive miles shall have been constructed, completed, and in readiness, upon like report patents shall be issued conveying to the company additional sections of the land. That by section 6 of the act it is provided that the President shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad, “and the odd sections of land hereby granted shall not be liable to sale or entry or pre-emption before or after they are surveyed, except by said company, as provided in this act.” That by section 18 of the same act the Southern Pacific Railroad Company was authorized to connect with the said Atlantic and Pacific Railroad at such point near the boundary line of the state of California as they should deem most suitable for a railroad line to San Francisco, and was required to have a uniform gauge and rate of freight and fare with the Atlantic and Pacific road, and was given similar grants of land, subject to all the conditions and limitations provided in the act, and was required to construct its road on the like regulations as to time and manner as provided in respect to the Atlantic and Pacific road. It is alleged that the Atlantic and Pacific Company duly accepted the said grant, and proceeded to construct its road, and on or about March 12, 1872, did designate the line of said road by a plat thereof filed in the office of the com-

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missioner of the general land office, and that all the odd sections on each side of said road for thirty miles were thereupon withdrawn from market and reserved from sale.

The bill, as amended, further alleges that by section 23 of an act of Congress approved March 3, 1871, entitled "An act to incorporate the Texas Pacific Railroad Company, and to aid in the construction of its road, and for other purposes," it was provided as follows:—

"That for the purpose of connecting the Texas Pacific Railroad with the city of San Francisco, the Southern Pacific Railroad Company of California is hereby authorized (subject to the laws of California) to construct a line of railroad from a point at or near Tehachapa Pass, by way of Los Angeles, to the Texas Pacific Railroad at or near the Colorado River, with the same rights, grants, and privileges, and subject to the same limitations, restrictions, and conditions as were granted to said Southern Pacific Railroad Company of California by the act of July 27, 1866; *provided, however*, that this section shall in no way affect or impair the rights, present or prospective, of the Atlantic and Pacific Railroad Company, or any other railroad company."

The bill, as amended, alleges that the Southern Pacific Company accepted this grant, and on April 3, 1871, did designate the line of its said road by a plat thereof, which it on that day filed in the office of the commissioner of the general land office, and did construct and complete the same in the manner and within the time prescribed, except that it did not connect with the Texas Pacific Railroad. It is averred that on or about March 29, 1876, April 4, 1879, and December 27, 1883, respectively, the commissioner of the general land office, without any authority of law therefor, caused certain patents to be signed by the President and by the recorder of the general land office, and issued the same to the Southern Pacific Railroad Company, for certain lands situated in the county of Los Angeles, State of California, in odd-number sections, within ten miles of the route of the road of said Southern Pacific Company, as shown by its designated route of location filed in the office of the commissioner of the general land office pursuant

to said act of Congress of March 3, 1871, and which said lands are also within thirty miles of, but more than twenty miles from the line of road of the said Atlantic and Pacific Railroad Company, as designated by its plat filed in the office of the commissioner of the general land office pursuant to the act of July 27, 1866. The amended bill also avers "that at the time the route of location of said Atlantic and Pacific Railroad was filed, on March 12, 1872, there was within the twenty-mile or primary limits of said road, situated opposite to the tracts described in said pretended patents, a large amount of land which had previous to that time been granted, sold, reserved, and otherwise appropriated, which amounted to more in the aggregate than the amount of the lands described in said pretended patents, but no indemnity land has been selected in lieu thereof by the government or said railroad company;" and that the lands described in the patents have at all times been "agricultural lands, and of greater value than other lands in the indemnity limits of said Atlantic and Pacific Railroad Company," and "have never been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of by the United States, or by the Mexican or Spanish governments, or any other government or authority, in whole or in part, or any estate or interest therein, otherwise than as set forth herein."

It is further averred that on or about March 27, 1837, Ignacio Palomares and Ricardo Vejar presented a petition to Juan B. Alvarado, then governor of Upper California under the Mexican government, for a grant of the place known by the name of "San Jose." That thereupon, after investigation, such grant was, on April 15, 1837, duly made by Governor Alvarado to said Palomares and Vejar of the place called "San Jose," in conformity with the plat attached to the petition, and within the boundaries therein expressed. That thereafter, and on or about December 16, 1839, one Louis Arenas and said Ignacio Palomares and Ricardo Vejar presented their petition to the prefect of the district for a grant for the land called "San Jose," ceded by the decree of April 15, 1837, and one additional league of grazing land. That subsequently, to wit, March 14, 1840, the then governor of the department of the Californias granted the

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land so petitioned for to said Arenas, Palomares, and Vejar, and that thereafter said grant was duly approved by the departmental assembly, and juridical possession of said land given to the said grantees. That on or about September, 1852, Henry Dalton, Ignacio Palomares, and Ricardo Vejar each severally filed his claim for confirmation of one third of the place called "San Jose," granted as aforesaid, with the board of land commissioners, pursuant to the act of Congress of March 3, 1851, entitled "An act to ascertain and settle the private land claims in the state of California," and thereafter, and on or about January 31, 1854, the said board rendered and entered its three several decrees, confirming to each of said claimants the land applied for. That on appeal to the district court, that court, at its December term, 1854, rendered its decree in each case, affirming that of the board of land commissioners, confirming to Dalton, Palomares, and Vejar an equal undivided one third each "of the lands of San Jose, granted by Juan B. Alvarado, governor of California, to Ignacio Palomares and Ricardo Vejar on April 15, 1837, and regranted by said governor on March 14, 1840, to said Palomares and Vejar, and to Louis Arenas, as described in the grant first mentioned, and the map to which the same refers, and which boundaries fully appear from the act of juridical possession" (described substantially as follows:) "Commencing at the foot of a black walnut tree; thence westerly 9,700 varas to the foot of hills called 'Los Lomas de la Puente,' to a large walnut tree on the slope of a small hill on the side of the road which passes from San Jose to Puente; thence northerly 10,400 varas to the creek (arroyo) San Jose, opposite a high hill at a large oak; thence easterly 10,600 varas to the arroyo San Antonio, to two young cottonwood trees; thence southerly 9,700 varas to the place of beginning," from which decree there was no appeal, and the same became final. That under the direction and on behalf of the United States surveyor-general for California, one George H. Thompson, deputy United States surveyor, did, in August, 1868, so survey and locate the said grant as to include as a part thereof all the lands described in the patents in question, and thereafter, and in the same year, such survey was duly approved by said surveyor-general, and the

same was then spread upon the records of the general land office and of the office of said surveyor-general. That subsequent to May 1, 1871, the said surveyor-general made another survey of said San Jose grant, upon which the United States did on January 20, 1875, issue its patent to said Dalton, Vejar, and Palomares, which patent was duly accepted by said claimants, and which said patent and final survey did not include any of the lands described in the patents in question; but that all the said lands “were claimed and occupied by said Henry Dalton, Ignacio Palomares, and Ricardo Vejar, their heirs and assigns, as a part of said San Jose grant, as petitioned for, granted, and confirmed, located, and surveyed from August, 1868, till March 1, 1872.” The bill, as amended, also alleges that by the act of Congress approved July 6, 1886, entitled “An act to forfeit the lands granted to the Atlantic and Pacific Railroad Company to aid in the construction of a railroad and telegraph line from the states of Missouri and Arkansas to the Pacific Coast, and to restore the same to settlement, and for other purposes,” all the lands and rights to lands in California theretofore granted and conferred upon said Atlantic and Pacific Railroad Company were forfeited, resumed, and restored to entry for non-completion of that portion of said railroad to have been constructed in California.

By an amendment to the amended bill it is alleged that the plaintiffs have elected, and do elect “to hold, select, reserve, and set apart all the lands in suit herein as a part of said twenty sections per mile granted to said Atlantic and Pacific Railroad Company by said act of Congress of July 27, 1866, and which were deducted and excluded from said grant to said Southern Pacific Railroad Company on account of said grant to said Atlantic and Pacific Railroad Company, and also on account of said San Jose ranch, and the location, claims, and survey thereof;” and further, “that the route of the Southern Pacific Railroad Company as designated by the plat thereof filed in the office of the commissioner of the general land office as aforesaid, and as located and constructed, is, and it was necessary that it should be, upon the same general line as that of the said Atlantic and Pacific Railroad Company, as designated by the plat thereof

filed by said company as aforesaid, and all the lands in suit herein are situated opposite to that portion of said routes which are upon the same general line, and are upon the same side of the designated route of the Atlantic and Pacific Railroad Company as the lands for which that company had a right to select indemnity or lieu for prior to July 6, 1886, and which right since that time has been in the United States.” Allegations are also made as to the value of the lands in controversy, and in respect to the claims of the defendants thereto. Three other cases, entitled, respectively, *United States v. Southern Pacific R. Co. et als.* (No. 67), *United States v. Southern Pacific R. Co. et als.* (No. 69), and *United States v. The Colton Marble & Lime Co. et als.* (No. 88), were submitted at the same time as the present case and upon the same arguments, and as they involve substantially the same questions, what is here said will apply to them as well.

While in these cases but a comparatively small amount of land is involved, the suits, it seems from a decision of the secretary of the interior rendered June 23, 1888, and reported in volume 6 of the decisions of the department of the interior, page 816, were instituted by the government to test its right to a large amount of land similarly situated. That decision was made upon an application on the part of the Southern Pacific Railroad Company that it be called on, under the act of Congress of March 3, 1887, for a reconveyance of the lands which were held by the land department to have been improperly patented to said company, so that upon a refusal to reconvey, suits might be brought by the government to set aside such patents, and that no further patents should be issued to said company for lands in the limits of the forfeited grant to the Atlantic and Pacific Railroad Company; and also that the then subsisting withdrawal of lands within the primary grant limit of the Southern Pacific Railroad (branch line), which are also within the granted and indemnity limits of the Atlantic and Pacific Railroad, should remain undisturbed until the rights of the Southern Pacific Company could be determined by suits before the courts. The secretary, in deciding upon the application, after dividing the lands covered by the grants into three

classes, to wit, (1) Lands within the common primary limits of the grant to the Atlantic and Pacific Railroad Company and of the grant to the Southern Pacific Railroad Company (branch line); (2) lands within the primary limits of the grant to the Southern Pacific Railroad Company (branch line), and within the indemnity limits of the grant to the Atlantic and Pacific Railroad Company; (3) lands within the indemnity limits of the grant to the Southern Pacific Railroad Company (branch line), and within the primary limits of the grant to the Atlantic and Pacific Railroad Company,—held that, as to the lands embraced in the first class, as thus divided, for which patents have been issued to the Southern Pacific Railroad Company, suits should be brought to annul them, and that all pending selections of similar lands be canceled, and other unpatented lands within said limits be restored to settlement and entry; and that the request of the railroad company that such lands be held in reservation until the rights of the company thereto could be determined by the courts be denied, the secretary basing his conclusions in that regard upon the decisions of the supreme court in the cases of *Missouri etc. Ry. Co. v. Kansas Pac. Ry. Co.* 97 U. S. 491, and *St. Paul etc. R. R. Co. v. Winona etc. R. R. Co.* 112 U. S. 720. In respect to the lands embraced in the third class, the secretary authorized the institution of like proceedings, upon the authority of the supreme court in the cases of *Kansas Pac. R. R. Co. v. Atchison etc. R. R. Co.* 112 U. S. 414, and *Sioux City etc. R. R. Co. v. Chicago etc. R. R. Co.* 117 U. S. 406. In respect to those embraced in the second class, while expressing a doubt whether the reservation of “prospective rights” (of the Atlantic and Pacific Railroad Company) prevented the attachment of the grant of the Southern Pacific Company to lands in place, he did not feel disposed to disturb the ruling made by the department in the cases of *Gordon v. Railroad Co.* 5 Dec. Dep. Int. 691; of *Coble*, 6 Dec. Dep. Int. 679, 812; and of *Voss* (decided December 10, 1887), in which cases it was held that lands within the indemnity limits of the Atlantic and Pacific Railroad Company were excepted from the operation of the grant to the Southern Pacific Company by the proviso to the twenty-third section of the act of March 3,

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1871, although said lands fell within the granted limits of the Southern Pacific Railroad, because the Atlantic and Pacific Company had a prospective right of selection of said lands whenever its grant should be located. But in view of the doubt expressed, the secretary concurred in the recommendation of the commissioner of the general land office that the unpatented lands of this class be continued in reservation pending adjudication by the courts, or until such time as the department should deem it proper to remove the reservation. The views of the department in the *Gordon, Coble, and Voss Cases* were the same as those of the assistant attorney-general in the case of *Railroad Co. v. Railroad Co.* 4 Dec. Dep. Int. 215, and were also in accord with those of Attorney-General Garland, given in response to a question submitted to him by the secretary of the interior. (6 Dec. Dep. Int. 814.)

The act of July 27, 1866, unlike almost all other grants of land made by Congress to aid in the construction of railroads, does not in terms fix a lateral limit within which the land granted is to be taken; but, reading sections 3 and 4 of the act together, and remembering what must never be forgotten in the construction of such grants, that the act is a law as well as a grant, and that effect must be given to the intention of Congress in making it, I think a lateral limit of twenty miles is, in effect, fixed within which the lands granted are to be taken, with a provision for the selection of indemnity lands, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of the sections embraced in the primary grant. Taking section 3 of the act alone, the grant to the Atlantic and Pacific Company would be precisely like that made by the nineteenth section of the act of July 2, 1864 (13 U. S. Stats. 364), to the Burlington and Missouri River Railroad Company, which was under consideration in the case of *United States v. Burlington etc. R. R. Co.* 98 U. S. 339. The grant there was of every alternate section of public land (excepting mineral land) designated by odd numbers, to the amount of ten alternate sections per mile on each side of the road, on the line thereof, which were not sold, reserved, or otherwise disposed of by the United States, or to which a pre-emption or homestead claim

had not attached at the time the line of the road was definitely fixed; and one of the positions taken by the government in that case was that the grant to the company was only of land situated within twenty miles of the road; but the court held that the position found no support in the language of the act of Congress, which simply declared that a grant is made of land to the amount of ten sections per mile on each side of the road. "The grant is one of quantity," said the court, "and the selection of the land is subject only to these limitations: (1) That the land must be embraced by the odd sections; (2) that it must be taken in equal quantities on each side of the road; (3) that it must be on the line of the road; and (4) that it must not have been sold, reserved, or otherwise disposed of by the United States, and a pre-emption or homestead claim must not have attached to it at the time the line of the road was definitely fixed." In the grant to the Burlington and Missouri River Railroad Company no indemnity was provided for, as is done by the act of July 27, 1866, and the act making the grant to that company, in providing for the issuance of patents for the lands as the sections of road should be completed, did not provide, as does the act of July 27, 1866, for the issuance of such patents, confirming to the grantee "the right and title to said land situated opposite to and coterminous with said completed section of said road;" but the provision there was that such "patents shall issue conveying the right and title to said lands to said company on each side of said road, as far as the same is completed, to the amount aforesaid." (13 U. S. Stats. 365.) And in the course of the opinion (98 U. S. 340) the court laid stress upon the fact that the terms of the grant did not require the land to be contiguous to the road, and if not contiguous, said the court, it is not easy to say at what distance the land to be selected would cease to be along its line. Nor is it without force that in the grant to the Burlington Company no provision was made for the selection of indemnity lands. Being simply a grant of quantity, without any limitation as to the distance from the road the land should be taken, there was no need for such a provision. In the act of July 27, 1866, however, not only is there a provision for the selection of land within

extended limits to make up any deficiency arising from the disposition of a portion of the granted land between the date of the act and the location of the road, of which there would have been no need had the grant been intended as one only of quantity, but, as has been seen, the provision contained in section 4 of the act for the issuance of patents as the sections of road should be completed refers to the land granted as being situated opposite to and coterminous with such completed sections. These considerations, it seems to me, justify the conclusion that the act of July 27, 1866, in effect, although not in terms, fixes a lateral limit of twenty miles on each side of the road within which every alternate section of public land designated by odd numbers is granted, with a provision for the selection of indemnity lands within an extended limit of ten miles. And although the point does not appear to have been made in any of the cases in which the act of July 27, 1866, was under consideration, the construction above adopted is that which has uniformly been taken by the courts, the land department, and by the only one of the railroad companies that complied with the conditions of the grant, and earned the granted lands.

As appears from the bill the lands in controversy here are situated along and within twenty miles of the line of the road of the Southern Pacific Railroad Company, as designated by its plat filed April 3, 1871, and as thereafter actually constructed, and more than twenty miles from, but within thirty miles of, the route of the Atlantic and Pacific Company as designated by its plat filed March 12, 1872. Had they been situated within twenty miles of the designated route of the Atlantic and Pacific Company they would clearly have fallen within the grant to that company, and consequently have been excluded from the subsequent grant to the Southern Pacific Company; for, if the construction above put upon the act of July 27, 1866, be the correct one, every alternate section of public land, designated by odd numbers, within twenty miles of the line of the road, as definitely fixed, would have passed to the Atlantic and Pacific Company as of the date of its grant. (*St. Paul etc. R. R. Co. v. Winona etc. R. R. Co.* 112 U. S. 726; *Sioux City etc. R. R. Co. v. Chicago etc. R. R. Co.* 117 U. S. 408,

and cases there cited.) It is contended by the government that all public lands designated by odd numbers, and embraced within the indemnity limits of the grant to the Atlantic and Pacific Railroad Company, are also excepted from the grant to the Southern Pacific Railway Company by reason of the proviso to the twenty-third section of the act of March 3, 1871, which, as has been seen, reads: "*Provided, however, that this section shall in no way affect or impair the rights, present or prospective, of the Atlantic and Pacific Railroad Company, or any other railroad company.*" The reason why, in grants in which a limit is prescribed, and all the alternate odd or even sections within the limit are granted, title to such sections attaches as of the date of the grant, and why, to lands embraced within the indemnity or lieu limits, no title attaches prior to selection, is that in the one case the land granted becomes ascertained, and consequently the title thereto fixed and perfected, by the location of the line of the road, whereas in the other case, there are no means known to the law by which the lands embraced in the grant can be ascertained prior to their selection. (Authorities, *supra*.) To lands to which no title could attach prior to selection, I do not think the Atlantic and Pacific Company had, at the time of the grant to the Southern Pacific Company, a present or prospective right. If it had such right to the particular lands in suit it had the same right to all other lands to which the right of selection might have applied. And since by the act making the grant, the Atlantic and Pacific Company was empowered to construct its road along the thirty-fifth parallel of latitude to the Colorado River, "at such point as may be selected by said company for crossing, thence by the most practicable and eligible route to the Pacific Ocean," the present and prospective right of that company, prior to selection, might be applied to any public land situated between the Colorado River and the Pacific Ocean with equal propriety as to the particular lands in controversy here. The effect of such a holding would be to give to the proviso as broad a scope as the granting clause to which it is appended. In other words, to hold that while purporting to make a grant to the Southern Pacific Company to aid in the construction of a railroad from a

point at or near Tehachapa Pass by way of Los Angeles to the Texas Pacific Railroad at or near the Colorado River, the grant in effect was defeated by the proviso. While the Atlantic and Pacific Company had, at the time of the grant to the Southern Pacific Company, a clear present and prospective right to all lands embraced within the primary limits of its grant, I am of opinion, for the reasons stated, that it had no right of any nature to any particular piece of land within the indemnity limits prior to its selection; and as the lands in question here never were selected by that company, but were selected and (except in one case) patented to the Southern Pacific Company under the direction of the land department, that the patents were valid, unless excepted from the grant to the Southern Pacific Company by reason of the alleged facts respecting the Mexican grant, San Jose, or by reason of that provision of the act of July 27, 1866, which declares "that if said route shall be found upon the line of any other railroad route, to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act." In the third section of the act of July 27, 1866, is to be found the terms of the grant to the Southern Pacific Company, as well as that to the Atlantic and Pacific Company, since the act of March 3, 1871, refers to section 18 of the act of July 27, 1866, and that in turn to the third section of the same act for the terms of the grant.

In addition to the proviso to which the grant to the Southern Pacific Company was made subject by the act of March 3, 1871, the grant to that company was also made subject to the provision that if the route it was authorized to designate should be found to be upon the line of any other railroad route, to aid in the construction of which lands have been heretofore granted by the United States, "as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act." The grant to the Atlantic and Pacific Company was the prior grant, and the amount of land granted to it was ten sections per mile on each side of its road when it passes through a state. This amount,

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by the provision annexed to the grant to the Southern Pacific Company, is to be deducted from the grant to that company where the routes are upon the same general line; and, as the grant to the Southern Pacific Company was also ten sections per mile on each side of its road, it results that no land was granted to the Southern Pacific Company where the routes of the two roads are upon the same general line. The allegations of the bill, which, upon demurrer, are to be taken as true, being that the route of the Southern Pacific Railroad Company as located and constructed is upon the same general line as that of the Atlantic and Pacific Railroad Company, as designated under the act of July 27, 1866, and that all the lands in suit herein are situated opposite to that portion of said routes which are upon the same general line, I am of opinion that in this respect the bill states a good cause of action. I am also of opinion that the allegations in respect to the Mexican grant, San Jose, are sufficient, if true, to invalidate the patents. The allegations show that that grant was *sub judice* at the date of the grant to the Southern Pacific Company, to wit, March 3, 1871, and that the lands in controversy were claimed to be within the boundaries of the Mexican grant up to March 1, 1872. If such was the fact, the lands in controversy were not public lands within the meaning of the grant to the railroad company. (*Newhall v. Sanger*, 92 U. S. 762; *Doolan v. Carr*, 125 U. S. 618; *United States v. McLaughlin*, 127 U. S. 428.) It is argued by counsel for some of the defendants that the San Jose grant was one by specific boundaries, and that, it having been ultimately ascertained by the government that the lands in controversy were not embraced within those boundaries, they were all the time public lands, and therefore subject to the grant to the railroad company. It is for the very reason that the grant was one by specific boundaries, coupled with the alleged fact that the lands in controversy were within the claimed limits of that grant at the time of the grant to the railroad company, that prevents the latter grant from attaching to them. (Authorities, *supra*.)

But one other point remains to be considered, and that is that the bill shows on its face such laches as that a court of equity should refuse to grant any relief, at least as against those who

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are purchasers from the railroad company. It is sufficient to say in response to this that the case here is not one in which the government has allowed its name to be used for the sole benefit of a private person, in which event it would be a mere nominal complainant; but here the government is the real party complainant, seeking the enforcement of its own rights, and is therefore not bound by any statute of limitations nor barred by any laches of its officers, however gross. (*United States v. Beebe*, 127 U. S. 338.) It results from these views that the demurrers in each of the cases should be overruled, with leave to the defendants to answer within the usual time. Ordered accordingly.

SANBORN MAP & PUB. CO. v. DAKIN PUB. CO. ET AL.

CIRCUIT COURT, NORTHERN DISTRICT OF CALIFORNIA.

JUNE 10, 1889.

1. COPYRIGHT—INFRINGEMENT.—Complainant sold a copyright insurance map to H. & M., who employed defendants to correct it, by reason of changes from time to time in buildings, etc., affecting risks. Defendants, in making such corrections, used pasters on complainant's map, and retraced portions of said map, and in some instances reproduced whole sheets of said map, by relithographing it. *Held*, that while defendants could correct the map by putting thereon their pasters of such corrections, nevertheless it was an infringement to retrace any material part of complainant's map, or to reproduce any material part thereof in making such corrections.
2. SAME—INJUNCTION—ACCOUNTING.—Complainant, in such case, is entitled to an interlocutory decree enjoining further infringements, and to an accounting for damages.

Before SAWYER, Circuit Judge.

In equity. Infringement of copyright. Application for injunction.

Messrs. Langhorn & Miller, for complainant.

Messrs. Van Ness & Roche, for defendants.

SAWYER, Circuit Judge (*orally*). This is a suit for the infringement of a copyright of a map showing the improvements on property and on the surrounding property as affecting the risks

for the benefit of fire insurance companies, so that they can have the map at hand in their offices, and know the character of their risks, which are noted on the map. This map is copyrighted by the Sanborn Map and Publishing Company. That company sold a copy of its map, or book of maps, I should say (each page covers one or more blocks), to Hutchinson and Mann. Hutchinson and Mann made corrections on it, as the risks changed from time to time, and they procured (the defendant) the Dakin Publishing Company to go over the field, note the changes, and make the corrections on the map. That company made the corrections by putting on pasters, showing the changes made, on the map which Hutchinson and Mann had purchased from the Sanborn Map and Publishing Company, and often by retracing and reproducing portions not by pasters. It is claimed that defendants, at the request of Hutchinson and Mann, had a right to do that. The owners certainly had a right to do anything they pleased with the map purchased from complainant so far as making changes and putting on pasters is concerned; but they did more than that. They reproduced portions of the map, sometimes nearly a whole sheet. When the corrections were so many that they found it cheaper and better to make out a sheet than to make the corrections on it by pasters in the book, they did so, and then relithographed it, and reproduced the page, multiplying the copies, and often, doubtless, supplying the copies to other companies having complainant's maps or books of maps. While they had a right to put on pasters, cut the map to pieces, and destroy it, they had no right to retrace or reproduce and multiply any material part of the map. In some instances they took whole sheets, made several changes in them, relithographed those sheets so amended, and used them, and doubtless furnished them to others to use. If they can do that on one sheet, they can do it on two, three, or four, and finally reproduce the whole book, availing themselves of the plaintiff's works as to all except the changes. If they can reproduce it once, they can do it a dozen times. If they can do it for one man they can do it for every insurance company, and multiply the work indefinitely to the great injury of the owner of the copyright. In my judgment, the reproduction, the re-

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Points decided.

tracing, or relithographing of any material part of the map is an infringement of the copyright. To the extent of the reproduction of complainant's work, defendants are liable for an infringement, and there must be a decree restraining them from so infringing. There will be a reference to the standing master to ascertain the profits in pursuance of these suggestions. It is an infringement to retrace or reproduce any material portion of the map. The mere putting on of the pasters and destroying the sheet, without reproducing any part of it, I do not think is an infringement. An accounting will be taken in accordance with that principle.

HEWITT v. STORY ET AL.

CIRCUIT COURT, SOUTHERN DISTRICT OF CALIFORNIA.

JUNE 17, 1889.

1. PLEADING — PLEAS IN ABATEMENT — WHEN TO BE FILED. — The act of Congress of March 3, 1875, section 5, provides "that if, in any suit commenced in a circuit court, or removed from a state court to a circuit court of the United States, it shall appear to the satisfaction of said circuit court, at any time after such suit has been brought or removed thereto, that such suit does not . . . involve a dispute . . . properly within the jurisdiction of said circuit court, or that the parties to said suit have been improperly or collusively made or joined . . . for the purpose of creating a case cognizable or removable under this act, the said circuit court shall proceed no further therein." Rule 9 of the circuit court provides that "when any matter in abatement, other than such as affects the jurisdiction of the court, shall be pleaded in the same answer with matter in bar or to the merits, or simultaneously with an answer of matter in bar or to the merits, the matter so pleaded in abatement shall be deemed to be waived." *Held*, that neither the act nor the rule authorizes the plea to the jurisdiction to be entered after answer to the merits, and after the commencement of taking testimony.

Before Ross, District Judge.

In equity. On motions to strike out plea, and to dismiss.

Messrs. Rowell & Rowell, and *Mr. John A. Wright* (*Mr. A. W. Thompson*, and *Messrs. Brousseau & Hatch*, of counsel), for complainant.

Mr. George E. Otis, and *Mr. Byron Waters* (*Mr. R. E. Houghton*, of counsel), for defendants.

ROSS, J. The original bill in this case was filed more than two years ago, having for its object the establishment of the complainant's alleged right to 500 inches of the water of the Santa Ana River, and the securing him in its use. Without filing any plea in abatement, the defendants, who are many in number, answered to the merits of the bill, and in due course the taking of testimony was commenced before the examiner, and continued from time to time for a considerable period. The complainant was then, on motion, of which notice was required to be given, allowed to file an amended bill, in which the claim made in the original bill was reduced from 500 to 333 $\frac{1}{3}$ inches of the water in question. In granting the motion of complainant to file the amended bill, it was, on motion of the respondents and upon complainant's consent, and in consideration of the fact that the taking of such testimony had cost the respective parties large sums of money and consumed much time, further ordered as follows:—

“That all of the testimony heretofore taken herein, with each and all, and subject to each and all of the several exceptions thereto, be held, deemed, and regarded as being taken upon the said amended bill of complaint, and the pleadings hereafter to be made thereto, so far as the same is or may be applicable to such amended bill of complaint, the answers thereto, and the issues presented thereby.”

The amended bill was duly served on the respondents, who obtained extensions of time to plead thereto to February 4, 1889, on which day, without filing any plea in abatement or to the jurisdiction, they answered the amended bill on the merits. To that answer complainant, on the same day, filed his replication. February 20, 1889, was then fixed upon by the examiner for the resumption of the taking of testimony, of which due notice was given to the respective parties. Upon the representation of respondents' counsel that they desired to amend their answer, and by consent of counsel for complainant, the matter was postponed until March 6th, at which time the respective parties appeared before the examiner, and then and there entered into this stipulation:—

“It is hereby stipulated that the respondents may amend

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their answers to complainant's amended bill of complaint herein on or before March 18, 1889, by serving and filing joint or several answers thereto, as they may be advised; that said answer or answers shall be served on complainant's solicitors on or before said eighteenth day of March, 1889; that verification of said answer or answers, and verification of all objections, exceptions, or replications thereto, is and are waived; that, in case complainant objects or accepts to any of said answers, such objections or exceptions, leave of the court being obtained, shall, upon two days' notice to respondents' solicitors, be set down for hearing by said court on or before March 22, 1889; that the further taking of testimony by and before Charles L. Batcheller, the examiner for said court, shall be set for and resumed on Tuesday, March 26, 1889, at eleven o'clock A. M.; that all of the testimony heretofore taken before said examiner on the original bill of complaint and answers thereto shall be deemed, held, and regarded as having been taken upon the issues framed by said amended bill of complaint and amended answer or answers thereto, so far as applicable, without taking the same anew, subject, however, to all objections taken at and upon the former hearings before said examiner, and as by him noted in said testimony, subject, however, to being read and signed by the respective witnesses."

On May 18th, instead of answering, counsel for the respondent, F. E. Brown, filed a plea to the jurisdiction, in which is set forth, on information and belief, that the complainant was not at the time of filing his bill, and is not now, a citizen of the state of New York, as is therein alleged, but that he then was and still is a citizen of the state of California, and that other persons claiming under the same title with complainant interests in the property which is the subject of the suit, are citizens of the state of California, but are not made parties complainant or defendant; and that it is not in the bill made to appear that such other persons, or any of them, were requested to and refused to join with complainant in bringing the suit; and that the suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of this court, in this: that parties have been improperly or collusively made and joined

as defendants for the purpose of creating a case cognizable by this court. A motion was thereupon made on the part of the complainant to strike this plea from the files of the case, and that motion, together with a motion to dismiss the suit, upon the same grounds as those stated in the plea, having been argued by the respective parties, are now to be determined.

The plea is attempted to be justified by section 5 of the act of Congress of March 3, 1875, and by rule 9 of this court, as amended in January, 1882. By the act referred to it is provided "that if, in any suit commenced in a circuit court, or removed from a state court to a circuit court of the United States, it shall appear to the satisfaction of said circuit court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said circuit court shall proceed no further therein, but shall dismiss the suit, or remand it to the court from which it was removed, as justice may require."

I understand the supreme court to have held, in effect, in the case of *Hartog v. Memory*, 116 U. S. 588, that this act has not altered the theretofore well-settled rule that, when the citizenship necessary for the jurisdiction of the federal courts appeared on the face of the record, evidence to contradict the record was not admissible, except under a plea in abatement in the nature of a plea to the jurisdiction, and that a plea to the merits was a waiver of such a plea to the jurisdiction; but that, notwithstanding the parties continue bound by that rule, "if in the course of a trial it appears by evidence, which is admissible under the pleadings and pertinent to the issues joined, that the suit does not really and substantially involve a dispute of which the court has cognizance, or that the parties have been improperly or collusively made or joined for the purpose of creating a cognizable case, the court may stop all further proceedings, and dismiss the suit;" and, further, "if, from any source, the court is led to suspect that its jurisdiction has been

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imposed upon by the collusion of the parties, or in any other way, it may at once, of its own motion, cause the necessary inquiry to be made, either by having the proper issue joined and tried, or by some other appropriate form of proceeding, and act as justice may require for its own protection against fraud or imposition.”

It is one thing for the court, in the interest of justice and in the exercise of the power conferred, and duty imposed upon it by the act of 1875, whenever it has reason to suspect that its jurisdiction is being imposed upon, of its own motion to cause the necessary inquiry to be made, to the end that all further proceedings may be stopped, and the suit be dismissed in the event it should be found that a fraud upon its jurisdiction has been committed, and quite another thing for parties to interpose pleas out of the regular and established order of proceedings. If the plea in question was properly filed, it might with equal propriety have been withheld until all of the testimony should be taken and then put in. It was too late when filed, or it would not have been too late then. That parties have the right, after answering to the merits and permitting testimony to be taken, thereby entailing expense upon the opposite party and consuming the time of the court and its officers, to interpose a plea to the jurisdiction, which from its very nature is a matter to be first disposed of, and which, under the long-established practice, should be interposed before answer to the merits, seems to me out of all reason. Such a practice should never be tolerated in the absence of a statutory requirement, for it would lead to unnecessary expense to the parties, and to great uncertainty, delay, and inconvenience in the proceedings of the court. I see nothing in the act of 1875, or in rule 9 of this court as amended in 1882, which at all sustains the position of respondent that such a plea may be filed by a party at any time; and that the same view of the act of 1875 was taken by the supreme court seems to me to be clear from the opinion in *Hartog v. Memory, supra*, in which it is in terms stated that in its general scope the rule prevailing prior to the passage of that act has not been altered, but that the statute did change the rule so far as “to allow the court at any time, without plea and with-

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out motion, to 'stop all further proceedings, and dismiss the suit the moment a fraud on its jurisdiction was discovered.'"
"Neither party has the right, however," continued the court, "without pleading at the proper time, and in the proper way, to introduce evidence, the only purpose of which is to make out a case for dismissal. The parties cannot call on the court to go behind the averments of citizenship in the record, except by a plea to the jurisdiction, or some other appropriate form of proceedings."

Nor is there anything in rule 9 of this court, as amended in 1882, to sustain the position taken by respondent. As amended, it reads: "Rule 9. *Matters in abatement.* All matters in abatement shall be set up in a separate preliminary answer, in the nature of a plea in abatement, to which the plaintiff may reply or demur; and the issue so joined shall be determined by the court before the matters in bar are pleaded. And when any matter in abatement, other than such as affects the jurisdiction of the court, shall be pleaded in the same answer with matter in bar or to the merits, or simultaneously with an answer of matter in bar or to the merits, the matter so pleaded in abatement shall be deemed to be waived. When the matter so pleaded in abatement consists of matter of fact, the plea or preliminary answer shall be sworn to; and when matters showing that the court has no jurisdiction, which might have been pleaded in abatement, are first developed during the proceedings in the cause upon the merits, the court will, upon its own motion, dismiss or remand the case, in pursuance of the requirement of section 5 of the act of March 3, 1875, and in its discretion, tax the costs of such proceedings upon the merits, so far as is practicable, to the party most in fault in not presenting such matters in some proper mode before proceeding upon the merits." The particular clause of this rule relied upon by respondent is that reading: "And when any matter in abatement, other than such as affects the jurisdiction of the court, shall be pleaded in the same answer with matter in bar or to the merits, or simultaneously with an answer of matter in bar or to the merits, the matter so pleaded in abatement shall be deemed to be waived." Even if this was saying that such matter

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in abatement as affects the jurisdiction of the court may be pleaded in the same answer with matter in bar or to the merits, or simultaneously with an answer of matter in bar or to the merits, it would be no authority for the position of the respondent in the present case, where the right is claimed, to interpose the plea after answer to the merits, and after the commencement of the taking of testimony.

A reference to the opinion of Judge SAWYER, however, in the case of *Sharon v. Hill*, 10 Sawy. 666, will show that the clause of rule 9, relied on by respondent, was inserted by that learned judge because of a doubt entertained by him as to whether the supreme court would hold that, since the passage of the act of 1875, the jurisdictional question might be raised in the answer, where no plea in abatement had been interposed, although at the same time expressing his own opinion that the old rule had not been changed by the act. "No decision of the supreme court," said he, "made since the passage of that act, as to whether this jurisdictional question may be raised in the general answer, where it has not in fact been otherwise presented, has been brought to my notice by counsel; and it has not been very clear to my mind what the ruling of the supreme court would be, were that point so presented. In my opinion, however, the former decision should be followed still. . . . The question is by no means new to me; and, in consequence of the doubt above expressed, where no plea in abatement is interposed, this court in January, 1882, amended rule 9 of its rules of practice so as to read" as above quoted. (10 Sawy. 669, 670.) Judge SAWYER proceeds to say, in the same opinion, that it is as important now to determine the question of jurisdiction upon a plea in abatement before going into the merits at large as it ever was, and that he sees in the act of 1875 no satisfactory indication of an intention on the part of Congress to change the rule theretofore prevailing in respect to that matter. Such being my own opinion, also, the complainant's motion is granted, and an order will be entered striking out the plea of the respondent Brown. There being nothing in the present stage of the case to justify its dismissal, the motion to dismiss is denied.

THE FIRST NATIONAL BANK OF SALEM v. THE SALEM
CAPITOL FLOUR MILLS COMPANY, ET AL.

CIRCUIT COURT, DISTRICT OF OREGON.

JUNE 17, 1889.

1. SALE OF PROPERTY IN TRUST.—A sale of property “in trust,” held under the circumstances not to be a sale in trust to pay the debts of the vendor.
2. GRANTOR’S LIEN.—A grantor’s lien on the premises conveyed, for the purchase price, is a personal privilege, not assignable with the debt, nor can the creditor of the grantor be subrogated to the same.
3. PURCHASE OF STOCK BY A CORPORATION.—In the absence of any statute to the contrary, a corporation may purchase and dispose of its own stock, provided the same is done in good faith, without intent to injure the creditors thereof, and they are not injured thereby.
4. EXECUTION OF DEED BY AN ATTORNEY.—An attorney of a corporation must execute a deed in the name of his principal, but under his own hand and seal.

Before DEADY, District Judge.

Mr. Tilmon Ford, for plaintiff.*Mr. William B. Gilbert*, for defendant Stuart.*Mr. John M. Bower*, for defendants, Kelly and McDonald.

DEADY, J. This suit is brought by the First National Bank of Salem, hereafter called herein the “Salem” bank, to enforce the lien of a mortgage given by the Salem (Oregon) Capitol Flour Mills Company, hereafter called herein the “Scotch” company, to secure the payment of its note for \$30,000.

William Stuart, who held a prior mortgage on the same property, executed by the City of Salem Company, hereafter called herein the “Oregon” company, to secure the payment of \$71,940, with interest, was made defendant. He appeared and filed a cross-bill, in which he admitted the claim of the plaintiff and asked to have his mortgage enforced.

Joseph Kelly and R. McDonald were also made defendants, the former being a British subject, and the latter a citizen of Rhode Island, on the ground that they pretend to have some interest in the property, as the judgment creditors of the “Oregon” company.

The case was before the court on a demurrer of the defend-

ants, Kelly and McDonald, to the cross-bill of the defendant Stuart, when the demurrer was overruled. (31 Fed. Rep. 580.)

Thereafter the defendant Stuart died, and the cross-bill was revived in the name of Hugh Lyon, Alexander Stuart, and others, the executors of the will of the deceased.

In the fullness of time, the case was put at issue, and heard on the amended bill, the cross-bill, and the revivor thereof, the answers of the defendants, Kelly and McDonald, the replications thereto, and the testimony taken before an examiner.

From these it appears that on and before August 2, 1883, the "Oregon" company was and still is a corporation formed under the laws of Oregon, with its principal place of business at Salem; that on said day said corporation, in pursuance of a resolution of its directors, made and delivered its promissory note to the defendant, William Stuart, a British subject, and a resident of Scotland, for the sum of \$71,940, payable on August 1, 1888, with interest at nine per centum per annum, payable half-yearly, for which interest, ten additional notes were given at the same time and made payable accordingly, with interest thereon at ten per centum per annum after maturity; and at the same time, and in pursuance of the like authority, said corporation duly executed and delivered to said Stuart, as a security for the payment of said principal and interest, a mortgage on its real property, situate in and about Salem, Marion County, Oregon, including its flour mills and Santiam water privileges; and also a mortgage on some village lots and parcels of land in Polk County, Oregon.

The resolutions of the directors, providing for the making of these notes and the execution of these mortgages, state that "it is considered to the best interests of the corporation to buy in and obtain 654 shares of its own stock, now held by the following persons," naming them, fifteen in number; that "it is necessary to raise upon its (the corporation) credit \$71,940, to pay for said stock;" and they authorize and direct "the president and secretary" of the corporation to borrow that amount from the defendant Stuart, and give him its notes and mortgages therefor, as was done.

The actual circumstances out of which this transaction arose

are as follows: The capital stock of the corporation consisted of 2,000 shares, of the par value of \$100 each, of which it does not appear how much was ever issued. William Reid was a large shareholder in the corporation, and the president and manager of the same, from its formation. The owners of the 654 shares of the stock became dissatisfied with his management and determined to sell out or buy a controlling interest in the corporation. At this juncture, about May 1, 1883, the defendant Stuart, who was also a large shareholder, arrived in Oregon from Scotland, and after canvassing the subject it was agreed, on June 2d, between himself, Reid, and others, holding a majority of the stock, that the "discontents" should be bought out on account of the corporation at \$110 a share, payable on August 2d, following. But when the parties came to close the bargain, the sellers refused to take the obligation of the president and secretary of the corporation for the money, but insisted on having the personal guarantee of the defendant Stuart. This he at first flatly refused, but after much persuasion and serious hesitation he consented, the president assuring him that before the day of payment came around, the shares could and would be resold in this market for the amount, and the obligation thereby discharged.

Soon after Mr. Stuart returned to Scotland, but the shares were not sold, and he was compelled to advance the money to pay the debt. The corporation kept the shares and gave him the notes and mortgages, as aforesaid.

On March 24, 1844, the directors of the "Oregon" company resolved to dispose of all their real property, as well as the wheat, flour, and grain sacks on hand, to the defendants, Stuart and James Tait, also of Scotland, or their assignees, upon payment of the actual cost price of the same "as soon as said price could be ascertained, or within a reasonable time thereafter; the president and secretary to execute and deliver the proper conveyances for that purpose at the time of payment of said sum, so to be ascertained."

Afterwards, on April 17, 1884, said directors affirmed this resolution of sale in favor of James Macdonald, of Scotland, as purchaser, at the suggestion of said Stuart and Tait, that he

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would take the property in trust for the "Scotch" company, then being formed by themselves and others under the British company's act of 1862; and further, that said Macdonald, either by himself or agents, should have the right to inspect the books, papers, and accounts of the "Oregon" company, for the purpose of ascertaining the first cost of its property.

On April 28, 1884, at a meeting of the stockholders of the "Oregon" company, at which 1,001 shares were present and voting, there being 1,179 then issued, the resolutions passed at the directors' meetings of March 24 and April 17, 1884, authorizing the sale of the property of the corporation to James Macdonald, were unanimously ratified and confirmed, and the prior mortgage of the same to the defendant Stuart was also "confirmed, ratified, and approved."

Thereafter, on June 6, 1884, at a meeting of the directors of the company, the real property of the corporation was scheduled and valued at \$230,694.68, and the personal property, less "the book debts and accounts," which were not sold, at \$164,023.36; in all \$394,718.04. And at a meeting of said directors, held on July 8, 1884, at which were present James Tait, director, and Alexander Stuart, agent of the "Scotch" company, it was resolved that inasmuch as said agent does not admit the correctness of the cost of certain items of the property as stated in said schedule, and it has been agreed between the directors of the "Oregon" company and the said agent and director of the "Scotch" company that said items shall be referred for final adjustment to a committee of two persons from each company, at Edinburgh, William Reid and William Stuart to act for the "Oregon" company, that on payment by said agent of \$70,054.63 on account of said purchase, the president and secretary do make the necessary conveyances of the property, subject to the adjustment to be made by said committee and to the payment of the mortgage of the defendant Stuart.

On July 10, 1884, the "Oregon" company, by its deed, duly executed by William Reid, its president, and William N. Ladue, its secretary, conveyed the property in question to James Macdonald of Edinburgh, Scotland, "in trust" for any corporation that might be organized to take and hold the same. The deed

purports to be made in pursuance of the resolutions passed at the meetings of the directors, held on March 25 and April 17, 1884, and the resolution passed at the meeting of stockholders, held on April 25, 1884, and for the consideration of \$220,000, the receipt whereof is thereby acknowledged.

On August 12, 1884, a meeting of the stockholders of the "Oregon" company was held, at which 1,022 shares of the stock were voted, there being then 1,201 issued, when the action of the directors at the meeting of July 8, 1884, in the matter of the adjustment of the cost of certain items in the schedule of the property of the corporation, and the execution of the deed to James Macdonald by the president and secretary, were unanimously ratified and approved.

On December 16, 1884, said James Macdonald duly conveyed the property to the "Scotch" company. The deed recites that the property was "purchased" for the "Scotch" company, and conveyed temporarily to Macdonald, "as its trustee, the consideration for the same having moved wholly from the said" "Scotch" company; and that it is the object of the conveyance to transfer "the legal title" to the same to the "Scotch" company and its assigns.

On February —, 1887, the "Scotch" company duly executed its mortgage to the defendant Stuart, on a tract of land near Salem, containing five acres, more or less, and particularly described in the amended cross-bill as a further security for the loan theretofore made by said Stuart to the "Oregon" company, it having been the intention of the parties thereto that such property should be included in the mortgage from said company to said Stuart, from which it was omitted by inadvertence.

On November 17, 1886, the "Scotch" company, being in the possession of the property aforesaid, duly executed and delivered its mortgage upon the same to the plaintiff, the "First National Bank of Salem," Oregon, and a citizen of said state, by Robert Livingstone of Portland, therein, its attorney in fact, in pursuance and by authority of a power of attorney to him, duly executed by said company on September 2, 1886, to secure the payment of its note of even date therewith for the sum of \$30,000, and payable one day after date to the order of said

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bank, with interest at ten per centum per annum, subject, however, to the prior lien of the mortgage thereon, theretofore executed by the "Oregon" company to the defendant Stuart, to secure the payment of \$71,940, with interest, the payment of which the mortgagor declares it has assumed. This note was given for prior advances made to the "Scotch" company by the Salem bank, with the approval of the bank examiner.

On August 14, 1885, the directors of the "Oregon" company, William Reid, A. Shaw, and S. M. Elliott voting in the affirmative, and William N. Ladue in the negative, passed a resolution stating that the corporation was indebted to the Oregon and Washington Mortgage Savings Bank of Oregon, a corporation formed under the laws of Oregon, and called herein the M. & S. Bank, in various sums theretofore advanced by the latter, that then exceeded \$33,000, and directing the president, William Reid, and the directors, Shaw and Elliott, to make and deliver to said M. & S. Bank, on behalf of the "Oregon" company, one promissory note for \$20,000 and another for \$12,000, payable in three days after date.

At this time and before and since William Reid was a large stockholder in and the president and manager of the M. & S. Bank. The notes were given as directed, the one for \$20,000 on August 14, and the one for \$12,000 on the 17th of the same month, and some time after their maturity the former was transferred to the defendant McDonald, and the latter to the defendant Kelly, without, so far as appears, any consideration therefor.

On August 25, 1885, Kelly commenced an action on the note held by him in the circuit court of the state, for the county of Multnomah, in which, on April 3, 1886, he obtained a judgment against the "Oregon" company for the sum of \$12,771.50, principal, attorney's fee, and costs, with interest on the principal from August 17, 1885, at the rate of nine per centum a year.

On October 18, 1886, McDonald commenced an action in the same court on the note held by him, in which, on December 6, 1886, he obtained a judgment against the "Oregon" company for the sum of \$14,369.22, principal, attorney's fee, and costs, with interest on \$14,071.60 of the same, from date. Both judgments were duly docketed in the lien dockets of the circuit courts

of Multnomah and Marion counties, prior to December 25, 1886, and executions issued on the same and returned *nulla bona*.

The defendants, Kelly and McDonald, stand in the shoes of the M. & S. Bank, whom they simply represent.

They claim that their demands are a lien on this property prior in time and superior in right to that of the Salem bank or the defendant Stuart, on the following grounds:—

I. That the conveyance to Macdonald of July 10, 1884, was in trust, that he or his grantee would pay the existing debts of the “Oregon” company, and thereby “the property was impressed with a trust” to pay the same.

There is not a syllable of evidence in the case to support this claim. On the contrary, it is clear that the conveyance to James Macdonald was made “in trust” only, that he would in due time convey the property to the “Scotch” company, which was then being formed for the purpose of owning it by the persons who negotiated the purchase.

It appears probable that at the time of the sale the “Oregon” company was in debt to the M. & S. Bank for advances, and doubtless it was expected that the former would pay the same with the proceeds of the sale of its property to the “Scotch” company. But the amount of the indebtedness has never been ascertained, and the agent of the “Scotch” company was prevented by the manager of M. & S. Bank from taking a copy of the account from the books of the same for the purpose of examination.

By the terms of the conveyance, the “Scotch” company assumed the payment of the Stuart debt, then amounting to over \$78,000, and at the delivery of the same it appears that the agent of the company paid over in cash \$77,134.20, which was largely applied by the manager on the claim of his bank; and although the resolution of the corporation authorizing the sale directed that the deed should be delivered on the payment of the consideration, yet the parties being unable to agree on the value of certain items of the properties embraced in the conveyance, and valued in the schedule at \$10,431, the deed was delivered with the understanding that when the balance

was ascertained by the joint committee of the two companies that was to meet at Edinburgh in a short time, it would be paid.

Before the committee met, however, there was a considerable loss on a shipment of flour which appears to have been afloat at the time of the delivery of deed. The committee of the "Scotch" company insisted that this flour was not on hand at the time of the purchase having been heretofore shipped against advances drawn thereon largely in excess of the proceeds of its sale, and therefore the loss must fall on the "Oregon" company. The committee of the latter company, William Reid, claimed that the flour, by the terms of sale, passed to the "Scotch" company, and that it was liable for its then value, less the advance, and must stand the loss; and because the committee of the "Scotch" company would not accede to this proposition, he refused to further attend the meetings of the committee, and left this and the other disputed items unsettled, as they still remain, so far as appears.

In the annual report of the president and directors of the "Oregon" company to the stockholders, dated October 5, 1885, it is stated that nine months before the corporation, under the advice of the president, had offered to the "Scotch" company, by way of compromise, to bear \$20,000 of the loss, which was believed to be over one half thereof, and that the latter company, not having accepted the proposition, it was withdrawn by the directors on August 14, 1885, and a friendly suit commenced in this court "to determine the various matters in dispute between the two companies." How much, if anything, is still due to the "Oregon" company from the "Scotch" company, it is impossible to say on this evidence. In the balance sheet of the latter for June 30, 1886, among the liabilities then existing there is this item: "City of Salem Company, balance purchase price of properties, \$39,360.11."

There was a contemporaneous agreement between the "Scotch" company and the larger portion, if not all the shareholders of the "Oregon" company, that their shares should be exchanged at their actual value for shares of the former at par, which, so far as carried into effect, would discharge the indebtedness of

the former to the latter, and was so intended and understood at the time of the sale.

But admitting that the "Scotch" company is indebted to the "Oregon" company, the M. & S. Bank is merely an unsecured creditor of the latter company, and has no lien or privilege on the property sold by its debtor to the "Scotch" company. The M. & S. Bank was only an unsecured creditor when its debtor sold this property to the "Scotch" company, which took the same without any liability, express or implied, to pay any of the grantor's debts, except the one due Stuart, that was already a charge on the land.

And if the debt of the M. & S. Bank had even been assumed by the "Scotch" company, the mere fact that it was prior in point of time to the debt of the Salem bank would not give it any right to priority of payment. In the absence of a bankrupt law or statute to the contrary, a debtor may prefer one creditor to another at his pleasure.

If the "Scotch" company is indebted to the "Oregon" company, a creditor of the latter may by proper proceedings subject such indebtedness to the satisfaction of his claim, but he has no right in the property of the former as against the lien creditors thereof.

II. Assuming that some portion of the purchase price is still unpaid, the "Oregon" company has a grantor's lien on the property for the amount, to which the defendants, Kelly and McDonald, are entitled in equity to be subrogated, to the extent of their demands against the grantor.

The existence of such a lien is admitted in this state. (*Coos Bay Wagon Road Co. v. Crocker*, 6 Sawy. 574; *Gee v. McMillan*, 14 Or. 268; 58 Am. Rep. 315; 3 Pomeroy's Equity Jurisprudence, secs. 1249, 1250.) But assuming that the Oregon company has a grantor's lien on the property for unpaid purchase money, the weight of opinion in the United States is that such lien is personal to the grantor and incapable of being transferred, either by direct assignment or equitable subrogation. (3 Pomeroy's Equity Jurisprudence, sec. 1254; *Baum v. Grigsby*, 21 Cal. 173; 81 Am. Dec. 153.)

In the latter case Mr. Justice FIELD, speaking for the court,

says of a grantor's lien: "It is simply a right to resort to the property upon a failure of payment by the vendee. It does not arise from any agreement of the parties, but is the creature of equity, and is established solely for the security of the vendor. It is founded on the natural justice of allowing a party to reach the property, which he has transferred, to satisfy the debt which constituted the consideration of the transfer. It is, therefore, the personal privilege of the vendor. The assignee of a note given for the purchase money stands in a very different position. He has never held the property which he seeks to reach, in consideration of the note he has received. He has never held the property, and has, therefore, no special claims upon equity to subject it to sale for his benefit. The particular equity of the vendor in this respect cannot in the nature of things be asserted by another."

The M. & S. Bank is not even the assignee of a debt alleged to be due the "Oregon" company from its grantee. In England and a few of the states of the Union, such an assignee may enforce the grantor's equity. But it does not appear that a mere creditor of such grantor can be subrogated to this right in any of the United States. (3 Pomeroy's Equity Jurisprudence, sec. 1254.)

III. The mortgage to Stuart is void, because the indebtedness it was given to secure, arose in fact out of a purchase by the "Oregon" company of its own stock from Stuart.

The rule appears to be well settled in the United States that a corporation may, unless prohibited by statute, purchase its own stock, or take it in pledge or mortgage. (*City Bank v. Bruce*, 17 N. Y. 510; *Taylor v. Miami Ex. Co.* 6 Ohio, 176; *In re Republic Ins. Co.* 3 Biss. 452; *Farmers' & M. Bank v. Champlain Trans. Co.* 18 Vt. 138; *Clapp v. Peterson*, 104 Ill. 26; *Dupee v. Boston W. P. Co.* 114 Mass. 37; Cook on Stock and Stockholders, secs. 311, 312.)

In the case cited from 104 Illinois the rule is stated unqualifiedly as follows: "A corporation may purchase its own stock in exchange for money or other property, and hold, re-issue, or retire the same, provided such act is had in entire good faith, is an exchange of equal value, and is free from all fraud, actual

or constructive, this implying that the corporation is neither insolvent nor in process of dissolution,” and that the rights of creditors are not thereby injuriously affected. In the case cited from 114 Massachusetts the court says: “In the absence of legislative provision to the contrary a corporation may hold and sell its own stock, and may receive it in pledge or in payment in the lawful exercise of its corporate powers.”

As a matter of fact the transaction in question was not a purchase of the stock by Stuart and a resale by him to the corporation. It was a purchase of the stock by the corporation through its directors, with intent to re-issue the same, and a guarantee of payment of the purchase price to the sellers, by Stuart. The subsequent note and mortgage was given to Stuart, in consideration of the amount he had to pay on his guarantee. At the date of the purchase the corporation appears to have been solvent. It was much more than able to pay its debts. The stock was sold above par, and the motive in selling was not so much to get rid of it, or the property and business which it represented, as a settled dissatisfaction with the management of William Reid. As evidence of this it appears that the “discontents” offered “to sell or buy”—to take the stock of Reid and his associates at the same figure.

The only creditor that the corporation appears to have had at the time was the M. & S. Bank, and its president and manager was a party to this transaction and urgent and active in its accomplishment. The purchase of the stock did not injuriously affect the interest of this creditor, nor was it so intended. It was made in good faith to acquire the control of a valuable property, free from the dissensions arising from the personal distrusts and antipathies of a dissatisfied faction of the stockholders.

Neither, in my judgment, is a purchase of stock by a corporation, even when made under circumstances or for purposes that make it voidable, generally and absolutely void, but only as against those who are injured by it, and in some proper and timely proceeding seek redress against it.

The defendants, Kelly and McDonald, claim to be the assignees of the M. & S. Bank, which was a creditor of the

“Oregon” company at the time of the purchase of the stock; but they do not allege or prove any circumstance that tends to show that the purchase was made in bad faith towards their assignor, or with intent to injure it, or that it was thereby injured.

That the stock of the “Oregon” company afterwards depreciated in value on account of losses sustained on shipments of flour, or that the debtor of the corporation, the “Scotch” company, thereafter became insolvent from like causes, does not affect the character of the transaction or the rights of the parties thereto.

And even admitting that the “Oregon” company was insolvent at the date of the mortgage, the situation of the parties was simply this: Stuart was a creditor of the corporation for money advanced for it, and the M. & S. Bank was nothing more. There being no statute to the contrary, the corporation had a right to prefer the one to the other, which it did, by giving Stuart security on its property.

IV. It is not shown that the “Scotch” company authorized “the making” of the mortgage to the Salem bank, or that the seal of the corporation was affixed thereto; and said mortgage was given for a pre-existing debt, with knowledge that the mortgagor owed the “Oregon” company, the debtor of the defendants, \$86,892.04.

Livingstone, the agent of the “Scotch” company, had a power of attorney under its seal, authorizing him to deal with this property as he saw proper, and this was sufficient authority for the execution of this mortgage. The mortgage does not profess to be the act of the corporation in person, so to speak. It is the deed of its attorney, a natural person, and is therefore well executed when signed and sealed by the latter. The seal of the corporation is affixed to its deed, the power of attorney, on which the validity of the mortgage ultimately rests.

The M. & S. Bank never had any interest in or lien on this property, nor even any pecuniary demand against the “Scotch” company, and therefore it is altogether immaterial that the plaintiff’s mortgage was given for a pre-existing debt with knowledge of an existing demand of the M. & S. Bank against the “Oregon” company.

But for the earnest manner in which these latter objections to this mortgage are urged, they would not have been deemed worthy of consideration.

And lastly, if the "Oregon" company was a defendant in this suit, it could not by means of an answer and without a cross-bill assert the claim made here by its assigns, Kelly and McDonald, that it had a grantor's lien on this property, or that the "Scotch" company took the same in trust, or "impressed" with a trust to pay the debts of the former. An answer is a means of defense and not attack. It is a shield and not a weapon. Resort must be had to a cross-bill in such case. (Langdell's Equity Pleading, sec. 115, et seq.)

There must be a finding that the "Scotch" company is indebted to the plaintiff in the sum of \$30,000, with interest from November 17, 1886; and to the defendant Stuart in the sum of \$71,940, with interest from August 2, 1884; and that the mortgages given by the Oregon and Scotch companies, as set forth in the amended and cross-bill herein, to secure the payment of said indebtedness, are valid, first liens on the property therein described in the order of their execution; and that the same be sold by the master of this court and the proceeds applied to the satisfaction of the same, with the costs and disbursements of this suit.

THE ASBESTINE TILING AND MANUFACTURING COMPANY
v. HEPP ET AL.

CIRCUIT COURT, DISTRICT OF OREGON.

JUNE 28, 1889.

1. **SUIT IN EQUITY FOR THE VIOLATION OF A RIGHT SECURED BY A PATENT.** — Under section 4921 of the Revised Statutes, where a decree is given in a suit in equity restraining the infringement of a right secured by patent, the court may also decree a recovery of the profits arising from such infringement and the damages the plaintiff has sustained thereby.
2. **MUNICIPAL CORPORATION — WHEN LIABLE FOR THE ACTS OF ITS OFFICERS.** — Where the council of Portland authorizes a contractor to lay a sewer in one of its streets, in pursuance of a power contained in its act of incorporation, and in so doing the contractor infringes upon the patent of another for making sewer pipe, the act being a corporate one for the benefit of the corporation, it is liable for such infringement, the same as a private corporation or person.

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Before DEADY, District Judge.

Mr. Albert H. Tanner, for plaintiff.

Mr. William H. Adams, for defendant, the city of Portland.

DEADY, J. This suit is brought by the Asbestine Tiling and Manufacturing Company, a corporation formed under the laws of Washington, against V. Hepp and F. D. Ball, citizens of the state of Oregon, and the city of Portland, a municipal corporation of said state.

It is brought to restrain the defendants from using or vending certain molds for making mortar pipes for which Ezra Hamilton, the inventor, on October 23, 1877, obtained a patent from the United States for the term of fourteen years, for an account of the profits arising from the making, using, and vending of said molds, and damages for the same.

The defendants, Hepp and Ball, answer the amended bill, and the city of Portland demurs thereto.

It appears from the bill that the plaintiff is the assignee of this patent for this county, and that the city of Portland is authorized by its act of incorporation to lay down sewers within the corporate limits, designate the material to be used in the construction of the same, exercise exclusive control in all matters relating thereto, and to assess the cost thereof on the property benefited thereby; that the defendant by its common council has employed and contracted with the defendants, Hepp and Ball, to put down numerous sewers constructed of pipe made with said molds, and in pursuance thereof has used a large number of said molds and a large quantity of pipe made by means thereof, and is about to contract with them for the construction of other sewers therewith.

On the argument of the demurrer the points made in support of it were these:—

1. The city of Portland in constructing sewers exercises a police power for the benefit of the public health, which “in no way inures to the profit or advantage of the city in its corporate capacity,” and therefore it “is not liable for the infringement of a patent in prosecuting such work.

2. The city of Portland is not liable for profits on account of the alleged infringement, "none being realized" or "claimed by the bill," hence equity has no jurisdiction.

3. The city, if liable at all, is only liable for damages, and these can only be recovered in an action at law.

By section 4921 of the Revised Statutes (sec. 55, act of July 8, 1870; 16 Stats. 206), it is provided that in cases arising under the patent laws, this court shall have power to grant injunctions "to prevent the violation of any right secured by patent; and upon a decree being rendered in any such case for an infringement, the complainant shall be entitled to recover, in addition to the profits to be accounted for by the defendant, the damages the plaintiff has sustained thereby."

Presumably, the city has made no profits out of the alleged infringement. But whether it has or not, or will not, the complainant is presumably damaged thereby to the extent of the royalty or license fee usually charged for the use of the patent.

Prior to the act of 1870, damages could not have been recovered in a suit in equity for the infringement of a patent, but resort must have been had to an action at law for this purpose.

The city, like any natural person, may be enjoined from violating any right secured to the patentee in this patent or his assigns, and the statute expressly provides that in case of a decree for an injunction, to restrain the infringement of a patent, the plaintiff shall be entitled to recover the damages sustained thereby.

In *Root v. Lake Shore Ry. Co.* 105 U. S. 189, the whole subject of redress in equity for the violation of a right secured by a patent is exhaustively examined by the late Mr. Justice Matthews. The bill was filed after the expiration of letters patent, for the profits derived by the defendant from the use of an improvement in railway car brakes. And as there could be no further infringement after the expiration of the patent, it was not a case for injunction, and consequently not of equitable cognizance.

In stating the conclusion of the court Mr. Justice Matthews said (p. 215), "that a bill in equity for a naked account of profits and damages against an infringer of a patent cannot be

sustained; that such relief ordinarily is incidental to some other equity, the right to enforce which secures to the patentee his standing in court; that the most general ground for equitable interposition is, to insure to the patentee the enjoyment of his specific right by injunction against a continuance of the infringement."

In the case under consideration, on the demurrer to the bill, the plaintiff is entitled to an injunction against the continuance of the infringement by the city, and thus gives this court, sitting as a court of equity, jurisdiction. Incidental to this, according to the rules of procedure in equity, and the express language of the statute (sec. 4921, Rev. Stats.), the court may give the plaintiff further relief, by way of the recovery of the profits made by the infringer, or the damages sustained by the plaintiff.

By the act of October 24, 1882, incorporating the city of Portland, the common council thereof is authorized to open, lay out, widen, grade, and improve the streets of the city, and by section 121 of such act "to lay down all necessary sewers and drains, and cause the same to be assessed on the property directly benefited by such drain or sewer;" and by subdivision 30 of section 37 of said act, the council is given the power "to regulate . . . the building and repairing of sewers."

In Dillon on Municipal Corporations, section 966 (3d ed.), it is said, that "such corporations are liable for acts of misfeasance positively injurious to individuals, done by their authorized agents or officers, in the course of the performance of corporate powers constitutionally conferred, or in the execution of corporate duties." But the writer adds there is "not a little diversity of opinion as to what duties are corporate duties."

However this may be, it is certain that the state may authorize the officers of a municipal corporation to perform a duty which is not corporate in its character or purpose, and for the omission or wrong-doing of which the corporation is not and ought not to be liable to any one. My attention has not been attracted to any specific instance of this kind. But many suggest themselves. For instance, if the state were to authorize and require the mayor of the city to keep a rain gauge or

weather record in Portland, or an account of the immigrants arriving at the port, in the performance of such duties he would be serving the public at large and not acting as the agent of the corporation.

But where the act is a corporate one, to be performed primarily for the benefit of the corporation—the inhabitants of the municipality—it is none the less a private, corporate act, because the public at large may be incidentally benefited thereby.

What few cases there are on this subject refer to and follow the ruling in *Bailey v. Mayor etc. of the City of New York*, 3 Hill, 531. In this case it appeared that certain “water commissioners,” appointed by the state under an act of the legislature to provide the city with pure and wholesome water, employed persons to build a dam across the Croton River.

The action was brought against the corporation to recover damages for injuries caused by the insufficient construction of the dam. The court held that the work was a corporate one; that the commissioners were the agents of the corporation; and that the latter was therefore liable for the injury.

In delivering the opinion of the court, Mr. Justice Nelson, in speaking of the grants of power to municipal corporations for exclusive public purposes and those for private purposes, and the difficulty sometimes of distinguishing them, said: “But the distinction is quite clear and well settled, and the process of separation practicable. To this end, regard should be had, not so much to the nature and character of the various powers conferred, as to the object and purpose of the legislature in conferring them. If granted for public purposes exclusively, they belong to the corporate body in its public, political, or municipal character. But if the grant was for the purpose of private advantage or emolument, though the public may derive a common benefit therefrom, the corporation, *quoad hoc*, is to be regarded as a private company. It stands on the same footing as would any individual or body of persons upon whom the like special franchises had been conferred.”

Certainly the purpose of the power to drain the streets of the corporation, for the health and convenience of the inhabitants thereof, is quite as much a private one as that of the power to

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furnish them with water. Like the power to maintain fire-engines and lights, the power to drain the streets by constructing sewers therein to carry off the waste water and refuse matter is granted and intended for the benefit and emolument of the corporation—the dwellers in the city—and not the general public, although the latter may be and is incidentally benefited thereby.

When the municipal corporation of Portland was created by the legislature, it was not contemplated that the inhabitants thereof should be left to perish in their own filth, and the place become a nuisance, and therefore the corporation is authorized, for its own benefit, to provide for the removal of its waste water and refuse matter by laying down sewers or constructing drains in its streets.

In *Ransom v. New York*, 1 Fish. Pat. Cas. 254, and *Bliss v. Brooklyn*, 4 Fish. Pat. Cas. 596, it was held that the municipal corporation was liable as an infringer for acts done in the course of the execution of its corporate powers and duties—the patents infringed being in the one case for fire-engines and the other for an improvement in hose couplings.

In *Elizabeth v. Nicholson Pavement Co.* 97 U. S. 126, it was not questioned that the corporation, having contracted with third persons to lay down a pavement on its streets, which was in fact an infringement of the pavement company's patent, was liable therefor as an infringer: for profits, if any were made, and for damages, if any were sustained. But the suit having been commenced before the passage of the act of 1870, "damages" could not be recovered therein, and it not appearing that any profits had been made by the corporation, there were none to recover.

Nor is it material, whether the council contracted for or required that the pipe to be used by the contractor should be made on the machine of the plaintiff. It is enough that it has accepted the same, or allowed the contractor to use it without the license of the patentee or his assignee.

WILMINGTON TRANSP. CO. v. THE OLD KENSINGTON.

DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA.

JULY 1, 1889.

1. SALVAGE—COMPENSATION.—The master of claimant's ship, having discovered that there was fire in the hold, requested libellant's services in towing her ashore, and extinguishing the fire. In performing these services libellant employed three tugs, aggregating \$40,000 in value, and a number of men. It appeared that, with the exception of a small tug about 10 miles distant, libellant's tugs were the only ones within 100 miles, and that they were maintained at an expense of about \$6,000 per month for towage, salvage, etc. The actual value of the services rendered by libellant and the damage to the property employed was \$1,510.41. The value of the ship was \$48,000, and her cargo \$23 790. *Held*, that \$4,510.41 salvage would be allowed.
2. TOWAGE—CONTRACT.—The master of the ship, desiring to put her aground, agreed to pay libellant \$500 to tow her ashore. When the ship in tow reached a suitable place, her port anchor was let go, and the tug ordered to go astern and draw the stern of the ship to the shore, so that she could be secured in that position, while another of libellant's tugs carried out a kedge anchor. *Held*, that the contract of towage did not end when the port anchor was cast, but when the ship was placed in the proper position to be put aground.

Before Ross, District Judge.

In admiralty. Libel for salvage.

Mr. Milton Andros, for libellant.*Messrs. Page & Fells*, for claimant.

Ross, J. This is a cause of salvage. That salvage services were rendered by libellant is not denied, but the parties are not agreed as to when such services were commenced, nor as to the amount the libellant should be awarded. It appears from the evidence that the ship Old Kensington was, on Sunday, April 7th, lying in the bay of San Pedro with a cargo of 2,641 tons of coal. The night before the attention of her master, Captain Jones, was called to what then appeared to be steam coming up the ventilator and hatchway, but it became so much denser the next morning that he requested the master of two other ships then in the bay (Captain Skinner, of the *Banduara*, and Captain McRitchie, of the *Apaye*) to repair on board and with him examine into the cause. That examination disclosed the fact that what at first appeared to be steam was in fact smoke, and

that there was fire somewhere in the ship; and it was then deemed best to endeavor to smother the fire, and also to make preparations for the discharge of the coal so as to reach the seat of the fire. Accordingly the captain directed the hatches to be closed, and then went ashore to arrange with the libellant for the discharge of the cargo. This was Sunday afternoon, about two or three o'clock, and the day making it inconvenient to get the required men together, and the captain not then anticipating any immediate danger, he arranged with the libellant for the sending by the latter of lighters and men the next morning to get the coal out. The next morning, Monday, libellant sent lighters and men, and the discharging of the cargo was commenced, the ship's men working in the hold. About six o'clock in the morning of that day three of the ship's pumps were put to work pumping water into her wherever they could get it, and this, together with the discharging, was continued as well as possible until midnight, at which time it became impossible for the men to remain in the hold because of the density of the smoke. The hatches were therefore again put down and the ship's pumps continued pumping water into the hold during the night. Meanwhile about 180 tons of coal had been discharged. Early the next morning, Tuesday, Captain Jones again requested the advice of Captains Skinner and McRitchie, who, after making a survey of the ship, recommended that she be put aground, and that water be pumped into her hold until the fire should become extinguished. At this time it was thought, by Captain Skinner at least, that the fire was both fore and aft, but an examination made after the discharge of the cargo showed the seat of the fire to have been on the starboard side, just abreast of the main mast, where the ceiling of the ship was burned through in several places for a space of about six feet in width and sixteen feet in length, and about twenty-five tons of coal burned or charred. For the purpose of carrying out the recommendation of Captains Skinner and McRitchie, Captain Jones went on shore about eleven o'clock on Tuesday morning, and endeavored to arrange with the libellant for the towing of the ship ashore, and for such other and further services as the exigencies of the case might demand. The libel-

lant was willing to, and did agree with the captain to tow the ship ashore for a stipulated sum, \$500, but would not make any agreement as to compensation for any other or further services, for the reason that it was impossible to anticipate what other or further services would be required; but the libellant was ready and willing to perform such other and further services as should be needed, and did do so upon the request of the captain of the ship, as will presently be stated.

Pursuant to the contract for towage, the libellant's tug-boat *Warrior* left the Wilmington wharf at about half past eleven o'clock Tuesday morning, reached the ship about twenty minutes to twelve, and towed her to the place which had previously, and after an examination of a chart in the office of the libellant, been selected for grounding her by Captains Jones, Skinner, and McRitchie. In towing the ship to the place thus selected, the captain of the tug-boat was directed by Captain Skinner, Captain Jones remaining on his ship and making the necessary soundings. When she came to three and a half fathoms, the port anchor was let go, and it is contended for the libellant that at this point the towage service ceased. At this time the ship was lying broadside to the beach, and was still floating. The *Warrior* then, by direction of Captain Skinner, went astern of the ship, and towed her stern onto the beach, the ship meantime paying out chain, and the libellant's tug-boat *Catalina* took out a small kedge anchor, which Captain Jones directed to be placed in order to keep the ship straight, with her stern on the beach. It is at this point, and I think rightly, that the claimants contend that the towage service ceased. The purpose had in view by both parties to the contract of towage was the placing of the ship aground, and in no just sense can the service be said to have ended until the anchors were placed to hold the ship in position. That was accomplished about three o'clock in the afternoon of Tuesday. The weather was then good, the barometer high, and there was but little swell. There was in the hold of the ship about two and a half feet of water, which had been put there by the ship's pumps and by two others which had been sent on board from the *Banduara* and the *Apaye* about nine o'clock of Tuesday. As soon as the ship was grounded and

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the anchors placed, the libellant, at the request of Captain Jones, commenced to pump water into her. The Warrior, except when prevented by the bursting of a hose and the breaking of her connections, which was occasioned by her surging, and which interruptions were in all about two hours in duration, continued to pump until half-past twelve Tuesday night, at which time she was ordered off, for the reason that it was not deemed safe, either for herself or the ship, for her to remain. The ship was on the ground, and the Warrior was on her starboard side, which was at the time the weather side, and during the afternoon and evening the swell was such that the Warrior parted a number of lines, among them an eight-inch hawser, twice, and two six-inch lines. Her upper and lower guards were also broken, her bits sprung, and her upper and lower fenders broken. During the same time one of the bulwark plates of the ship was cracked, a stern chock broken, and some of her stanchions carried away. The Warrior was therefore ordered off, but kept within hailing distance of the ship. The pumps used by the Warrior were a three-inch siphon, with a rated capacity of 5,000 gallons per hour, under 40 pounds of steam, which in this instance was increased to 85 pounds, and which should have increased the capacity about one third, and a one and a half inch hose connected with the Warrior's donkey-pump, the capacity of which was about 7,000 gallons at the speed at which it was run, and a small pump which was used during the interruptions referred to. The libellant's tug-boat Falcon went to the aid of the ship at six o'clock Tuesday evening, with a six-inch No. 10 Vanduzen suction-pump, with a rated capacity of 14,000 gallons an hour. In this instance the pressure was increased to 85 pounds. She was undergoing repairs in the morning, and it was impossible to get her ready before the hour named. She came up on the port side of the ship and commenced, and, except when interrupted by the breaking of a pipe and the carrying away of the hose from the coupling, caused by the surging of the tug, continued to pump water into the ship during the whole of Tuesday night, and until half-past eight o'clock Wednesday morning, at which time the fire was found to be extinguished, and the pumping ceased. There was

then fifteen and a half feet of water in the ship, and while it is impossible to determine with any degree of certainty the relative amount of water put there by the pumps of the ship and those of the libellant's tugs, I think from the evidence that there is no doubt that much the larger quantity was pumped by the latter. The interruptions in the pumping of the Falcon lasted from an hour to an hour and a quarter, during which time the necessary repairs were made by libellant's engineer by means of fittings and other appliances that he had taken the precaution to provide.

While I think the service rendered by the Catalina in taking out and placing the ship's kedge anchor was a part of the towage service, for which a specific contract was made, the salvage service of the Catalina commenced before that time. When Captain Jones was on shore Tuesday morning, at his request the libellant placed its superintendent, engineer, blacksmiths, and men, with the requisite tools and appliances, on board the Catalina, and sent her out to aid the ship. The engineer remained in charge of the pumps of the tugs, but the master of the ship decided that he did not need the blacksmiths, and they, with the superintendent, returned to shore, on board the Catalina, about four o'clock of Tuesday. As the Catalina was steaming away the captain of the ship requested the libellant's superintendent to send out thirty-five men to aid in pumping, which was promptly done by means of the Catalina, and those men worked all of Tuesday night, pumping and putting in water by means of buckets. After the fire was extinguished, the captain of the ship was desirous of having the water pumped out of her as speedily as possible. He started the ship's main pump, and portable force-pump, and the force-pump of the Apaye, and at his request the Falcon went to San Pedro to get a pump for the same purpose. She did so, and reached the ship again, with the pump, about two o'clock of Wednesday. Considerable difficulty was experienced in making the tug fast and in finding a suitable place for the pipe, but the pump was gotten to work about six o'clock, and continued pumping from 10,000 to 11,000 gallons an hour until about half-past three o'clock the next morning. The Falcon parted several lines while thus engaged, occasioned by surging backwards and forwards, and

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was in some danger of having her house, smoke-stack, and mast carried away by one of the yards of the ship, which was cock-billed. During the afternoon of Wednesday the libellant, at the request of the captain of the ship, sent a lighter alongside, which would not have been done but for the perilous position of the ship, for the purpose of taking out coal, and a considerable quantity of coal was thus discharged. The lighter was in good condition when this service was commenced, but was damaged by it so that it leaked, but to what extent does not appear. About three o'clock Wednesday night the ship floated, and the pumping then ceased. There was then four feet six inches of water in her. As soon as the chain and anchor were hauled in, to accomplish which consumed several hours, the ship was towed to her former anchorage by the Warrior, which she reached about six o'clock Thursday morning. During the time the ship was on the ground she was undoubtedly in a dangerous position, not only because of the existing fire, but because the coming on of bad weather might, and almost certainly would have made a wreck of her. It is true that during the time she was aground the barometer was high and the weather was good, and so continued for some weeks after, but there was sufficient swell to cause the damage already mentioned, and to cause the ship to thump quite heavily; and during the night of Tuesday the sky was overcast. It also appears from the evidence that during the month of April severe southeasterly winds are very rare at San Pedro, but that westerly and southwesterly winds frequently come up, and sometimes very strong and suddenly; and also that at times off-shore winds cause a heavy swell in that bay. In cases of this nature there is no standard by which can be absolutely measured the compensation to which the party rendering the service is entitled. Each case depends in large measure upon its own circumstances. While it is perfectly true that salvage is not a "*question pro opere et labore*, but rises to a higher degree, and takes its source in a deeper policy," there is a broad distinction, as said by Dr. Lushington, "between salvors who volunteer to go out and salvors who are employed by a ship in distress. Salvors who volunteer go out at their own risk for the chance of earning reward, and if not successful they

are entitled to nothing, the rule being that it is success that gives them a title to salvage remuneration. But if men are engaged to go out to the assistance of a ship in distress they are to be paid according to their effort, even though the labor and service may not prove beneficial to the vessel or cargo." (*The Undaunted*, 1 Lush. 90; *The Sabine*, 101 U. S. 390.) In the one case the reward should be more liberal than in the other. Here the services of the libellant were rendered at the request of the master of the ship, for which it was entitled to be paid whether such services were beneficial or not; and although the services were rendered with promptness and efficiency, there was not manifested any disposition on the part of the libellant to take any chance of earning reward, but, on the contrary, it appears that the libellant was unwilling to send the Falcon to aid the ship unless her master requested that it be done. Under such circumstances, while the libellant should be awarded a sum in excess of the actual value of the services rendered and the actual damage done to its property engaged in the service, and while such excess should be liberal, it should not, in my judgment, be measured by that high standard that would control the award had the services been rendered voluntarily. The proof shows the actual value of the services rendered by libellant and the actual damage done to its property engaged in the service to be \$1,510.41, which, of course, will be allowed. The value of the ship was \$48,000, and of her cargo and freight \$23,790. The value of the Warrior and Falcon was \$30,000 each, and of the Catalina \$10,000. These tugs are maintained at San Pedro for the purpose of rendering towage, salvage, and other services, at an expense of about \$6,000 per month, and with the exception of a small tug, the McPherson, at San Diego, which is distant about 100 miles from San Pedro, and a small tug, the Pelican, at Redondo Beach, about 10 miles distant, are, as appears from the evidence, the only tugs maintained along the coast between San Diego and San Francisco. Considering all of the facts and circumstances of the case, I think \$3,000 over and above the actual value of the services rendered and the actual damage done, making in all \$4,510.41, is a fair sum to be awarded the libellant, for which amount, with costs, a decree will be signed.

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THE BORROWDALE—T. F. NEIL, LIBELLANT.

DISTRICT COURT, DISTRICT OF OREGON.

JULY 16, 1889.

1. **COMPILATION OF 1887.**—The compilation of the general statutes of Oregon, provided for in the act of February 26, 1885, and published in two volumes, with the certificate of the governor, of August 9, 1889, prefixed thereto, as required by said act, is *prima facie* evidence of the general statutes of Oregon, then in force, which may be cited and referred to, in both judicial and legislative proceedings, by the chapter, title, and section as therein arranged, set down, and enumerated.
2. **REVISION AND AMENDMENT OF STATUTES UNDER SECTION 22 OF ARTICLE 4 OF THE CONSTITUTION.**—An act amendatory of another act should contain the sections of the latter act as amended, at full length, but it need not also contain such section as unamended; the act amended need not be published at full length in the amendatory act unless the amendments thereto amount to a revision of the same, by producing some change in every section thereof.
3. **SUBJECT-MATTER OF ACT—EXPRESSION THEREOF IN TITLE.**—An act entitled merely an act to amend a certain section of the Compilation of 1887 is void, for want of expression of the subject of the same in the title thereof; but an act entitled an act to amend an act relating to pilotage purports itself to be an act relating to pilotage, and the subject thereof is therefore sufficiently expressed in the title.

Before DEADY, District Judge.

Mr. Edward N. Deady, and Mr. Horace B. Nicholas, for libellant.

Mr. Cyrus A. Dolph, for defendant.

DEADY, J. This suit is brought by the libellant, T. F. Neil, against the ship Borrowdale, to recover a balance of \$92.06, alleged to be due the libellant for pilotage.

It is alleged in the libel that on May 30, 1889, the libellant was a duly licensed pilot for the Columbia River bar, and that on that day he took charge, as such pilot, of the Borrowdale, and brought her in over the bar to her anchorage, at Astoria; that the Borrowdale then drew 20 feet of water and her registered tonnage was 1,197 tons; and that for said service the libellant is entitled to demand and receive the sum of \$176, of which sum only \$83.94 has been paid, leaving a balance due the libellant of \$92.06.

The master and claimant, George Guthrie, excepts to the libel, stating that it appears therefrom that the libellant has

received for his services all that by law he is entitled to demand or receive therefor.

This exception is in the nature of a demurrer to the libel, and raises the question, whether the rate of compensation which the libellant is entitled to receive is that fixed by the law as it stood prior to February 18, 1889—eight dollars per foot for the first twelve feet of draught of the vessel, and ten dollars per foot for each additional foot—or that prescribed by the act of that date (Sess. Laws, p. 11)—four dollars per foot draught and two cents a ton for each ton over one thousand tons registered measurement.

For the better understanding of this question it may be well to premise, that on October 20, 1882, an act was passed, entitled “An act to provide for pilotage on the Columbia and Wallamet rivers.” By section 28 of this act the compensation for bar pilotage was fixed at six dollars a foot for the first twelve feet draught and at eight dollars for each additional foot.

On February 18, 1885, an act was passed, entitled “An act to amend an act, entitled” as above. (Sess. Laws, p. 34.) By this act, said section 28 was so amended as to make the compensation of bar pilots eight dollars a foot for the first twelve feet draught and ten dollars for each additional foot. On November 25, 1885, an act was passed, entitled “An act to amend section 21 of an act, entitled” as last above. (Sess. Laws, p. 23.) The act referred to, as being thereby amended, has no section 21, and what was probably meant was section 21 of the act of 1882, which was amended by section 1 of the act of February 18, 1885. However, the compensation of pilots was not thereby affected. On February 21, 1887, an act was passed, entitled “An act to amend an act, entitled” as last above, “and also sections 3 and 28 of the act of February 18, 1885.” (Sess. Laws, p. 93.) But the last-named act had no section 28, and the section 28 doubtless intended was the section so numbered in the original pilot act of 1882, which was amended, as above, by the act of February 18, 1885. Neither did this amendment change the rates for bar pilotage.

On February 26, 1885, an act was passed, entitled “An act to provide for collecting, compiling, and distributing the laws

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of Oregon, with annotations.” (Sess. Laws, p. 142.) This act authorized the secretary to purchase one thousand copies of such compilation when prepared; the same to be first “submitted to the governor for examination,” and to be by him certified “to contain all the general statutes in Oregon in force arranged in the order and method of a code, and in sections numbered consecutively from 1 to the end of the entire body of general statutes, with marginal notes, showing the date of the passage of each section.” This “compilation” was to be in two volumes, and so arranged that the codes should be in the first volume and the other general statutes in the second one.

Section 4 of the act provides: “From and after the time when the said compilation shall be examined and certified by the governor, as hereinbefore provided, it shall be in force, and shall be received in all courts of this state, as an authorized *compilation* of the statutes of Oregon.”

On August 9, 1887, the governor prefixed his certificate to a “compilation of the statutes of Oregon,” published in two volumes, made by “William Lair Hill,” copies of which appear to have been purchased and distributed by the secretary in pursuance of said act of February 26, 1885, and properly known as the “Compilation of 1887.”

The pilotage act of 1882, and the several acts amendatory thereof, passed in 1885 and 1887, as above stated, constitute title 1 of chapter 66 of this compilation.

On February 18, 1889, in this state of the law on the subject of pilotage, an act was passed, entitled “An act to amend title 1 of chapter 66 of Hill’s Annotated Laws of Oregon, relating to pilotage, at the Columbia River bar, and on the Columbia and Willamet rivers.”

By this act sundry sections of this title were amended so as to read as therein set forth. Among these is section 3918, which appears from the subject-matter and the marginal note thereto to be section 28 of the original act of 1882, as finally amended by section 2 of the act of 1887.

The enactment of this section in the amendatory act is in this form:—

“Section 7. That section 3918 of Hill’s Annotated Laws of

Oregon be, and the same is hereby amended so as to read as follows:—

“Sec. 3918. The compensation for piloting a vessel upon or over the bar pilot grounds per foot draught of said vessel is as follows: For piloting an inward or outward bound vessel to or from Astoria over the bar, or from within the bar to the open sea, four dollars per foot draught of said vessel, and two cents a ton for each ton over one thousand tons registered tonnage of said vessel. . . .”

The compensation which the libellant has received is all that the act of 1889 allows him to demand.

Admitting this, the libellant contends that this act is invalid, because passed in contravention of sections 20 and 22 of article 4 of the Constitution. It is also admitted that if the contention of the libellant, in this respect, is right, he is entitled to demand and receive the compensation provided in section 3918 of the Compilation of 1887, or section 2 of the act of 1887.

The special grounds on which the validity of the act is impugned are these:—

1. The “subject” of the act is not expressed in the title thereof, as required by section 20 of article 4 of the Constitution, which declares: “Every act shall embrace but one subject, . . . which *subject* shall be expressed in the title.”

2. The act or title sought to be amended is not set forth and published at full length, as required by section 22 of said article, which declares: “No act shall ever be revised or amended by mere reference to its title; but the act revised or section amended shall be set forth and published at full length.”

3. The reference in the act to “section 3918 of Hill’s Annotated Laws of Oregon” is “meaningless,” as there are no such “laws” known to the law of Oregon.

It would have been proper and convenient if the act of 1885 had declared by what name the compilation of the laws therein provided for should be known and cited. But this was not done, and the sufficiency of any designation of the same, or reference to it, must depend on the circumstances of the case.

The act of 1885 contemplates that the general laws of the state will be “collected, compiled, and annotated by W. Lair

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Hill;" and the certificate of the governor, prefixed to what purports to be such compilation, states that it was "compiled and annotated by *William Lair Hill*," who is assumed to be the same person as "*W. Lair Hill*."

Section 4 of the act of 1885 designates the work as a "compilation," and declares that when certified by the governor, as required by the act, "it shall be in force, and shall be received in all courts of the state as an authorized *compilation* of the statutes of Oregon."

It is not admitted that the legislature could by any such means *make a law*, and therefore the words, "shall be in force," may be rejected as surplusage.

But it was competent for the legislature to authorize this compilation of the laws otherwise "in force," and to provide that the volumes in which it should be published, and the designation of the laws therein by chapters, titles, and sections, with the corresponding sections of the original acts in the margin, should thereafter be evidence of what are the general statutes of Oregon, and how they are divided and enumerated in chapters, titles, and sections. For instance, the legislature may provide that section 2 of the act of February 21, 1887, prescribing the compensation of the Columbia bar pilots, may hereafter be cited and known as section 3918 of a compilation of the general laws of Oregon. And in my judgment, that is what the legislature has done; so that said section 2 may now in all cases, in the legislature and the courts, be cited and referred to as section 3918 of the Compiled Laws of Oregon. (See *People v. Pritchard*, 21 Mich. 241.)

Still the question remains, does the reference in the act of 1889 to "section 3918 of Hill's Annotated Laws of Oregon" sufficiently indicate the compilation of the laws authorized by the act of 1885?

As the act has not provided by what name this compilation shall be known, it may be designated by any word or phrase which will indicate with reasonable certainty that it is meant or intended.

The most proper and natural designation of the publication is that used in the act authorizing it—"compilation." The work

is not a “code,” although it contains the codes of Oregon, as well as the miscellaneous laws, “arranged under appropriate heads and titles in the order and method of a code.” The annotation is a collateral and subordinate part of the work; and the phrase, “annotated laws,” is by no means an accurate or definite designation of the publication. The compilation of the general laws of Oregon (1887) is a full and complete title of the work, which in common practice may be conveniently shortened to “Compilation (1887).” And to this may be prefixed, according to the taste of individuals, and for greater certainty, the name of the compiler.

It was said, on the argument of the exception, that the work does not contain “all the general statutes of Oregon,” and a particular omission was mentioned. It did not, however, relate to the subject of pilotage. Besides, the certificate of the governor is *prima facie* evidence of the fact that it does contain all the statutes of a general nature, in force at the date of the certificate.

I say *prima facie*, for certainly it may be shown by a comparison with the original roll, that there is an error in the compilation, either of omission or commission. But probably this could not be done, by a comparison with a certified copy of the roll, as that would be the certificate of the secretary of state against that of the governor.

The volumes to which the governor’s certificate is prefixed are *prima facie* the compilation provided for in the act of 1885. The section 3918 of the same appears by the marginal note therein to be section 2 of the act of 1887, regulating the compensation of Columbia bar pilots; and the amended section 3918, as “set forth” in the act of 1889, is upon the same subject, and almost in the same words. If the act of 1889 had referred to the section thereby amended as “section 3918 of the laws of Oregon,” there being no such section, except in this authorized publication, the inference would be reasonable, that such was intended by the legislature. The additional words, “Hill’s Annotated,” prefixed to the words “Laws of Oregon,” only serve, under the circumstances, to strengthen this conclusion, because it appears that Mr. Hill prepared and annotated this compilation.

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This is not, in this respect, like the case of *Harland v. Washington*, 3 Struve, 131, cited by counsel for the libellant. In that case an act entitled "An act to amend section 3050 of chapter 380 of the Code of Washington," said code being, as appears, a private and unauthenticated compilation of the laws of Washington, was held void and inoperative, because there was no such section known to the laws of the territory as the one sought to be amended.

My conclusion on this point is, that the compilation of August 9, 1887, is an authentic publication of the general statutes of Oregon, then in force, that it may, for both judicial and legislative purposes, be properly cited or referred to by the designation of chapter, title, and section, as therein arranged and set down, and that the legislature intended to and did refer to section 3918 of said compilation, in the passage of said act of 1889, at section 7 thereof, for the purpose of amending the same as therein set forth.

On the second point but little need be said. The act of 1889 is not, in my judgment, a revision of the act of 1882, as amended by the acts of 1885 and 1887, and compiled and published in title 1 of chapter 66 of the Compilation of 1887. The purpose of the former act, and the effect of it, is, to amend certain sections of the latter, or the compilation thereof, each section so amended being the subject of a separate enactment, and set forth in the amendatory act, and published therein at full length.

What is revision of an act as distinguished from an amendment thereof, within the purview of the constitution, which makes it necessary to set forth at full length in the amendatory act the act as revised, it is not necessary now to decide. No authority was cited by counsel on the point. My impression is, that as long as there is one section of the original act untouched, there is no revision, and it is sufficient to set forth and publish in the amendatory act only the sections actually amended, and as amended. In this case an act or title containing one hundred and one sections was amended by changing only ten of them and repealing two. Neither is this an amendment by a "mere reference" to the title of the act amended. On the contrary,

each section amended is referred to by its number in the compilation, and “set forth and published at full length” in the amendatory act, as amended. The claim, once made, that it is necessary to set forth and publish at full length, in the amendatory act, the section amended, both before and after amendment, is long since denied. (*Portland v. Stock*, 2 Or. 69; *People v. Pritchard*, 21 Mich. 241.)

The case of an amendment of a section of an act or compilation, by simply repealing a distinct paragraph, clause, or subdivision thereof, or by adding thereto such a paragraph, clause, or subdivision, the same being supplemental in its nature, whereby the operation or effect of the words of the original section is not changed or affected, but the operation of the section as amended is merely enlarged or made to include additional subjects or become operative under other circumstances, is a peculiar one, and probably no other publication or setting forth is necessary, in the first instance, than that of the amendatory or repealing act; and in the second one, of the additional paragraph, clause, or subdivisions.

On the first point, counsel for the libellant insist that the “subject” of the act is not expressed in the title thereof, because it appears therefrom that the object of the act is “to amend title 1 of chapter 66 of Hill’s Annotated Laws of Oregon,” and it does not appear therefrom what is the “subject” of such title 1.

The purpose of the constitution in requiring the “subject” of an act to be expressed in the title thereof is apparent, and has often been stated by courts and judges with great unanimity. Briefly, it is to give notice to the members of the legislature and others concerned of the general scope and purpose of the proposed legislation, and to prevent the enactment of laws containing clauses and provisions not indicated by the title, or having no proper connection with the subject as therein expressed. Therefore, the constitution is not complied with in this respect by the expression of a or any subject in the title, but *the* subject of the act must be truly expressed. (*People v. Hills*, 52 N. Y. 453.) “But,” as was said by Mr. Justice Cooley, in *People v. Mahaney*, 13 Mich. 495, “this purpose is fully accomplished when the law

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has but one general object, which is fairly indicated by its title.” (See, also, *People v. Banks*, 67 N. Y. 571.)

If the title of this act ended with the words “laws of Oregon,” there is no doubt in my mind that the act would be void for want of the expression of its “subject” in the title. An act simply entitled an act to amend a certain section of this compilation, contains no statement of the “subject” in the title, and is void. No one can say from the reading of the title what the “subject” of the act is. *Harland v. Washington*, 3 Struve, 142, is a case directly in point. It was there held that the “subject” of the act was not expressed in such title, and that the act was, therefore, void. The question is thoroughly considered in the opinion of the court, and the conclusion maintained by argument and authority, which are unanswerable.

The “subject” must be expressed, stated, set forth in the title. It is not sufficient if it, the subject, may be found elsewhere, as in the section to be amended, from what is said or suggested in the title of the amendatory act.

But the title of this act goes further, and says, laws of Oregon “relating to pilotage at the Columbia River bar and on the Columbia and Wallamet rivers.” No expression of the “subject” of the act need be more explicit than this. From the whole title of the act, it appears that the “subject” of the title of the compilation, which it is the object of the act to amend, is “pilotage” on the waters therein mentioned.

If the “subject” of an amendatory act is ever sufficiently expressed in the title thereof, when the same contains the title of the act to be amended, in which the “subject” of the latter act is sufficiently expressed, then this is a good title.

An act entitled an act to amend an act relating to pilotage, purports in such title to relate to pilotage also. That is the subject of the act as expressed; and if there is anything in the act which does not relate to pilotage, the constitution avoids it. In my judgment an act entitled “An act to amend an act entitled ‘An act to provide for pilotage on the Columbia and Wallamet rivers,’” does express the subject thereof in the title. Such is the title of the amendatory act of February 18, 1885. (Sess. Laws, p. 34.) An act purporting by its title to be an act

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to amend another act relating to pilotage, does thereby itself purport to be an act relating to pilotage, as much so as if it had been expressed in so many words.

But if the law is otherwise on this point, and it is not enough that the subject of the act to be amended is expressed in its title, which title is incorporated in the title of the amendatory act, the words in the title of the act in question, "to amend title 1 of chapter 66 of Hill's Annotated Laws of Oregon," may be omitted therefrom as surplusage. The title would then read: "An act relating to pilotage at the Columbia River bar and on the Columbia and Wallamet rivers." This is certainly a good title, and would have been so if it had ended with the word "pilotage."

It is not necessary that the title should also show that the act is an amendatory one. It is sufficient if the "subject" thereof—the person or thing on or concerning which it is intended to operate—is expressed therein. If it is intended thereby to amend some prior act on that subject, that must be done by proper and apt words and references in the body of the act, as prescribed in the constitution.

My conclusion is, that this act was passed in conformity with the fundamental law, and is therefore valid. This being so, the libellant is not entitled to recover anything beyond the sum already paid to him for his services as pilot on the Borrowdale.

The exception is sustained and the libel dismissed.

BUSBY v. LADD.

CIRCUIT COURT, NORTHERN DISTRICT OF CALIFORNIA.

JULY 22, 1889.

1. PATENTS FOR INVENTIONS—INVENTION.—Where a welt of a double piece of leather, inserted in a seam in such manner that the edges come on the inside so as to require no trimming on the outside, the welt presenting a rounded appearance, has been for years used in gentlemen's and ladies' saddles, in leathern cushions, horse collars, leather bags, satchels, hand-bags, ladies' reticules of various kinds, and in the uppers of boots and shoes, it requires no invention to transfer the same kind of welt to gloves. This is but a double use for analogous and similar purposes, and is not patentable.

Before SAWYER, Circuit Judge.

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Opinion of the Court—Sawyer, C. J.

In equity.

Suit upon a patent in which the following is the claim: "The improvement in the manufacture of gloves, consisting of inserting a welt of a double piece of the same material and color of the body, the edges of which come on the inside, whereby a uniform color of welt and glove is maintained, and the necessity of trimming avoided, substantially as and for the purposes herein described."

Messrs. Langhorne & Miller, for plaintiff.

Mr. A. P. Van Duzer, and *Mr. John L. Boone*, for defendant.

SAWYER, Circuit Judge (*orally*). After a careful examination of this case, in view of the state of the art disclosed, and the decisions of the supreme court, I am unable to see that the claim covers a patentable object. The double-welted seam has been used for a long time in various articles of general use, as in gentlemen's saddles, ladies' saddles, leather cushions, horse collars, leather bags, satchels, hand-bags, and ladies' reticules of various kinds. The file wrapper in the case, in evidence, itself, shows that there was a prior patent for the same thing in the uppers of boots and shoes. It requires no invention to transfer that seam from one of these articles to a glove. They are analogous and similar uses of the same thing, and the patent office declined to grant a patent, at first, until the patentee inserted in the claim a welted double seam of the "same material and same color." It seems to me to be only a double use of the seam. It is claimed that this is a patent for a process. Certainly the mere using the same material constitutes no element of a process, and it requires no invention; nor is color a part of a process. The selection of a particular color is merely the exercise of taste. The tendency of the decisions of the supreme court for some years has been to limit the field of patentable objects, and the tendency still continues. Under the view I take of the case the bill must be dismissed, and it is so ordered. I will add, that, under the view taken, I do not find it necessary to determine whether the

Statement of Facts.

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double-welted seam had been before used in gloves. I am, however, disposed to think that a prior use in gloves has not been satisfactorily shown. There is, as is usual in these cases, some vague and shadowy testimony of such use at Gloverville, and other places in New York, some twenty-five or thirty years ago, which for some reason was discontinued; but there is, also, much testimony by parties engaged in the business at those places at the time to the contrary. The evidence of such prior use in gloves is not very satisfactory, but it is unnecessary to pass absolutely upon that point.

BLACK v. SOUTHERN PAC. R. Co.

CIRCUIT COURT, NORTHERN DISTRICT OF CALIFORNIA.

JULY 29, 1889.

1. **SHIPPING — LIABILITY OF VESSEL FOR TORT — LIMITING LIABILITY — PROCEEDING EXCLUSIVE.** — Proceedings of the United States district court, under admiralty rule 54, United States supreme court, and sections 4283 and 4285 of the Revised Statutes, the act of Congress of June 26, 1884, and section 4289 of the Revised Statutes, as amended by act of June 19, 1886, to limit the liability of ship owners for loss or damages to persons or goods, supersede all other actions and suits for the same damages in the state or national courts, upon the matters being properly presented therein.
2. **IDEM.** — In the nature of the case, where the jurisdiction of the district court has attached, it is exclusive.
3. **IDEM. — TIME OF FILING PETITION — RULE 54.** — The petition or libel may be filed in the district court before, as well as after, suit commenced to recover damages.

Before SAWYER, Circuit Judge.

At law. Motion to stay proceedings and strike the case from the calendar.

The steamer, Julia, was a duly enrolled and licensed vessel, under the laws of the United States, for the coasting trade, and was employed, in connection with the railroad of the Southern Pacific Company, as a part of its continuous line of overland transportation between the state of California and other states, in the business of commerce and navigation, and in navigating between Vallejo Junction, in the county of Contra

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Statement of Facts.

Costa, across the straits of Carquinez, to South Vallejo, in Solano County, in the state of California, upon tide waters, and within the admiralty jurisdiction of the United States. On February 27, 1888, as she was leaving her dock at South Vallejo for Vallejo Junction, with a considerable number of passengers, but without cargo, her boilers exploded, in consequence of which about thirty passengers lost their lives, and eight others were injured; and the steamer was so largely damaged that she was beached at South Vallejo. The Central Pacific Railroad Company as owner, and the Southern Pacific Company as lessee, in pursuance of admiralty rule 54, thereupon filed a petition in the United States district court for the Northern District of California, stating the foregoing and other necessary facts; that suits were about to be commenced against them by the heirs and representatives of the parties killed, and by parties injured, for sums largely in excess of the value of the interest of the petitioners in the vessel and freight; and prayed that they might be declared entitled to the benefit of the act of Congress as expressed in sections 4283, 4284, and 4285 of the Revised Statutes of the United States, and of an act passed June 26, 1884, and particularly section 18 of said act; also the benefit of section 4289 of the Revised Statutes, as amended by an act passed June 19, 1886. They also asked that they might be permitted to convey all their interest in said steamer and freight to a trustee to be named by the court, for the benefit of the parties injured, and the heirs and representatives of those killed, and that they might be discharged from further liability in the premises. The court rendered a decree appointing a trustee, and authorizing a conveyance for the benefit of the heirs of those killed and the parties injured, and the conveyance was made in pursuance of the order. After the filing of the said petition the plaintiff commenced this suit to recover fifty thousand dollars for injuries alleged to have been sustained by the explosion on said steamer Julia; whereupon the defendant presented to this court a certified copy of the petition and said decree of the district court, and thereon, and on affidavits stating the facts, moved that the proceedings in this case be suspended, and the case stricken from the calendar.

Opinion of the Court—Sawyer, C. J.

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Mr. Benj. Morgan, for plaintiff.

Mr. T. I. Bergin, for defendant.

SAWYER, Circuit Judge (*orally*). This is an action to recover damages for injuries sustained by the explosion of the boilers on the steamer *Julia*. After the explosion, and a few days before the commencement of this suit, the Southern Pacific Company and the Central Pacific Railroad Company filed a petition in the United States district court, stating the facts about the explosion, and the number of persons that were injured and killed, and offered to surrender the vessel, and all their interest in it, and asking to be allowed the advantages provided under the statutes of the United States in such cases. The district court rendered a decree after monition, accepting the property, and appointing a trustee, to whom they conveyed it in pursuance of the offer in the petition, and decree entered thereon. A few days after that, the plaintiff, Black, commenced this suit for fifty thousand dollars, damages for injuries sustained by the explosion. This is a motion to stay proceedings, and strike the case from the calendar. More properly it should have been in terms to dismiss the case, the district court having jurisdiction of the entire subject-matter of this suit, as well as of the surrender of the vessel, to distribute the proceeds under the statute, and determine whether the company should be exempted from any further payment after the surrender of the vessel thus made or not. In the case of *Providence etc. Steamship Co. v. Hill Manuf. Co.* 109 U. S. 578, the United States supreme court held that the district court having acquired jurisdiction, its jurisdiction so acquired, is, in the nature of the case, exclusive, and it is the duty of all other courts to whose attention the matter is properly brought, to suspend proceedings, dismiss the suit, and refer the whole matter to the district court. That was affirmed in the case of *Butler v. Boston Steamship Co.* 130 U. S. 527.

The plaintiff opposes this motion, on the ground that under rule 54 of the United States supreme court in admiralty, relating to these matters, inferentially, the company are only authorized to file their petition in the district court after a suit has

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been commenced. The form of the rule is a little ambiguous, it is true. It is that a petition or a libel may be filed in the district court after the suit has been commenced, but it does not say anything about filing it before suit commenced. In the case of *Ex parte Slayton*, 105 U. S. 451, the supreme court held that under this rule a petition may be filed before, as well as after, the commencement of the suit, so that the supreme court has construed its own rule, adversely to the position taken by the plaintiff. The defendant has filed a copy of the petition in the district court, and of the decree upon it, and there is no dispute as to its correctness, except that, the decree has been modified by striking out the injunction. The remainder of the decree remains as it was. When brought to the attention of this court, its duty, is, according to the decisions of the supreme court, to suspend all proceedings in the case. The supreme court of the United States says, that the suit should be dismissed. The motion here, in form, is, to suspend all further proceedings in the case, and to strike the case from the calendar. I do not know exactly what is meant by striking the case from the calendar, otherwise than dismissing it. We are not in the habit of striking cases from the calendar until they are disposed of, because inconvenience may result therefrom many years afterwards. The proceedings will be suspended, and I think the suit may as well be dismissed. If counsel, however, think that is not proper, I will leave them to move to amend in that particular. Let the proceedings be suspended, and the suit dismissed.

N. DELBANCO v. E. S. SINGLETARY ET AL.

F. N. LEVY ET AL. v. SAME ET AL.

CIRCUIT COURT, DISTRICT OF NEVADA.

JULY 29, 1889.

1. REMOVAL OF CAUSES—TIME OF APPLICATION.—Defendants demurred to plaintiffs' complaints in the state court. The demurrers were heard and sustained in the state court, and plaintiffs were given leave and time to file amended complaints, which they filed. To plaintiffs' amended complaints defendants demurred, and at the same time filed their petitions and bonds for the removal of the cases to this court. *Held*, that the petitions and bonds were not filed within the statutory time, and that the cases must be remanded.
2. *IDEM*—FILING TRANSCRIPT OF RECORD—RULE OF COURT.—Under rule 79 of this court (ninth circuit) the plaintiff may, at any time after defendant has filed and submitted to the state court his petition and bond for the removal of the cause, procure a transcript of the record of the cause from the state court, and file the same in this court, and after service of notice thereof, as provided in said rule, this court will take jurisdiction of the case for all purposes.

Before SABIN, District Judge.

Motion to remand.

Mr. J. A. MacMillan, and *Mr. M. S. Bonnifield*, for plaintiffs.

Mr. W. F. Goad, *Mr. W. S. Bonnifield*, and *Mr. W. C. Belcher*, for defendants.

SABIN, J. The points involved in each of the above cases are substantially the same, and the causes are considered together, the same ruling being applicable to each case.

The actions were begun in the state court, and removed to this court; summons and complaint were served on the defendant Singletary, May 27, 1889. By state statute, defendants were required to plead or answer within ten days after the date of service of summons, exclusive of the day of service, i. e., June 6, 1889. On that day, to wit, June 6, 1889, all of the defendants in the actions appeared by counsel, and filed demurrers to the complaints, on various grounds.

On June 8th the demurrers were heard by the court and sustained, and plaintiffs were given ten days within which to file amended complaints, and defendants were given twenty days,

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after service of said amended complaints, to answer thereto. On June 15th plaintiffs served and filed amended complaints in each action, and on July 3d defendants filed demurrers thereto, together with their petitions and bonds for the removal of the cases to this court, and on July 5th the state court ordered the cases transferred to this court. Under rule 79 of this court, plaintiffs caused a transcript of the record in each case to be filed in this court, on July 8th, and they now move that the cases be remanded to the state court on the ground that the petitions and bonds for removal were not filed within the time required by the act of Congress of August 13, 1888.

Under repeated rulings of this and other circuit courts, it is clear that the cases must be remanded. It has been repeatedly held by the supreme court, under the removal act of 1875, that the hearing of a demurrer was a trial of the case, within the meaning of that act. (*Alley v. Nott*, 111 U. S. 472; *Scharf v. Levy*, 112 U. S. 711; *Laidley v. Huntington*, 121 U. S. 179.) It has also been repeatedly held by the same court, under the removal act of 1875, that the "term at which the cause could be first tried" was the first term after issue joined, when in the ordinary course of proceedings the case could be ready for trial, and be tried. And that where the trial of a case had been continued over the first term of court at which it could be tried, either by order of court or stipulation of parties, a petition for removal of the case, filed thereafter, came too late. (*Babbitt v. Clark*, 103 U. S. 606; *Pullman Palace Car Co. v. Speck*, 113 U. S. 84; *Gregory v. Hartley*, 113 U. S. 742; *Keoting v. American O. Co.* 10 Fed. Rep. 17; *Theurkauf v. Ireland*, 11 Sawy. 512; *Keeney v. Roberts*, 12 Sawy. 39.)

From these authorities it will be seen that parties desiring to remove their cases to the national courts have always been held to a strict compliance with the statute relative thereto. The removal act of 1888 is much more restrictive than that of 1875. The right of removal is confined to the defendant, and he must file his petition and bond for removal "at the time, or any time before the defendant is required by the laws of the state, or the rules of the state court in which the suit is brought, to answer or plead to the declaration or complaint of the plaintiff." Under

the removal act of 1888, writs of error, or appeals, do not lie to an order remanding a case to the state court; but if they did, it cannot for a moment be doubted but that the supreme court would hold the defendant to a strict compliance with the statute in all respects.

In the cases at bar, the petitions and bonds for removal were not filed until the demurrers to the amended complaints were filed, and after a hearing and judgments on the first demurrers. This was clearly too late. (*Wedekind v. Southern Pacific Co.* 36 Fed. Rep. 279; *Dixon v. Western U. Tel. Co.* 38 Fed. Rep. 377; *Hurd v. Gero*, 38 Fed. Rep. 537; *Kaitel v. Wylie*, 38 Fed. Rep. 365.)

We think it will be better for all parties concerned—will save time and expense to litigants—if it is clearly and distinctly understood that parties desiring to remove their cases from the state courts must act promptly, and comply strictly with the provisions of the statute relative thereto. That courts have not the authority to, and will not, by doubtful construction, enlarge, change, or modify the clear terms of the statute. The statute is clear and simple as to the time when the petition and bond for removal must be filed, and parties must comply with it. In *Wedekind v. Southern Pacific Co. supra*, decided by this court, an inference might arise that possibly an order of a state court, extending defendant's time to plead, might be construed as extending his time within which to file his petition and bond for removal of the cause. If such inference fairly arises in that case, we wish here to correct it, as under the authorities cited it seems clear that such an order of the state court could not have that effect. The state court could not, by order or otherwise, enlarge or modify the terms and provisions of an act of Congress, nor confer jurisdiction upon this court, which otherwise it would not have. It is urged on the part of two of the defendants that inasmuch as the summons and complaint were served on only one of the defendants, the time of the defendants not served to plead or answer must be considered as commencing at the date of the order of court sustaining the demurrers, and giving plaintiffs leave and time to file amended complaints. We think this point untenable. The defendants all appeared at the time

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of filing the demurrers to the first complaints, and judgments were had in their favor upon said demurrers. Such appearance was a waiver of service of summons, and necessarily of the intervening time between service of summons, had they been served, and the time at which they filed their demurrers. And further, the actions are not separable as between the defendants, and they could not be removed as to two of the defendants only. They must be removed as to all, or none.

It is further urged by defendants that these motions to remand are premature at the present time, and cannot now be entertained or heard by the court. It is contended that, as the removal act only required the *defendant* to file a copy of the record of the case in this court "on the first day of its then next session . . . and said copy being entered as aforesaid in said circuit court, the cause shall then proceed in the same manner as if it had been originally commenced in said circuit court," therefore the court cannot entertain these motions until the next term of court, to wit, next November term, or session. In support of this position counsel cite *Baltimore etc. R. R. Co. v. Koontz*, 104 U. S. 5. We do not consider this case particularly applicable to the cases before us. The point here involved was not considered or discussed in that case, but rather the reverse, to wit, the power of the circuit court to permit a copy of the record to be filed *after* the first day of the term when it should have been filed. And the supreme court hold that in a proper case, on cause shown, the circuit court might permit the record to be filed after the first day of the term at which it was due. But the opinion in that case does not intimate that the record may not be filed in the circuit court at any time after the petition and bond are filed in the state court, and before the next term of the circuit court, by any party interested, other than the removing party, or that being so filed, the circuit court would not have full jurisdiction of the case. Counsel also cite *Kansas City & T. Ry. Co. v. Interstate Lumber Co.* 36 Fed. Rep. 9. This case is closely analogous to the cases before us, but we are not able to concur in the conclusion reached in that case. Indeed, we think the tendency of the authorities cited and referred to in that case is to an opposite result. It does not appear from

that case, as reported, whether or not there is any rule of court in the eighth circuit regulating the matter of procuring the record from the state court by any party other than the party seeking to remove the case, and filing it in the circuit court. From the fact that no mention is made of any such rule of court, we infer that the court has not adopted any such rule in reference thereto, as prevails in this circuit.

Rule 79 of this circuit provides:—

“Whenever proper proceedings have been perfected in a state court to remove a case from such court to this court, pursuant to any statute of the United States, either party may, at any time thereafter, as of course, file the transcript required by law in this court, and serve written notice of such filing upon the adverse party, or his attorney; and upon filing in this court satisfactory evidence of the service of such notice, the clerk shall enter the action upon his register, and thenceforth the provisions of rule 78 of this court shall be applicable thereto, and the same proceedings may be thereafter had as if the transcript had been filed by the party removing the same at the time prescribed by law.”

Rule 78 provides in regard to amendments of pleadings, etc. Rule 79 was adopted in March, 1879. It was made under the authority of section 918, Revised Statutes, which provides:—

“The several circuit and district courts may from time to time, and in any manner not inconsistent with any law of the United States, or any rule prescribed by the supreme court under the preceding section, make rules and orders directing the return of writs and process, the filing of pleadings, the taking of rules, the entering and making up of judgments by default, and other matters in vacation, and otherwise regulate their own practice, as may be necessary or convenient, *for the advancement of justice and the prevention of delays in proceedings.*”

Rule 79 was the outgrowth of the case of *Mahoney M. Co. v. Bennett*, 4 Sawy. 289, and was intended to cover that and all similar cases, where long delay might occur by reason of the neglect of the removing party to file the record of this court.

As said by the court in that case, “it is true as urged by defendant that the statute makes no provision for filing the copy

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of the record before the first day of the succeeding term, or by any other person than the party removing the cause. But it is also true that there is nothing prohibiting the filing of the record at an earlier day, or by any party interested, other than the one removing the cause."

The reasoning of the court in that case is applicable in the cases before us. The next term or session of this court begins November 4th. The petitions and bonds for removal were filed July 3d. Hence, if defendants' contention is correct and tenable, there must be a delay of four months in these cases. And this *merely for delay*, for, as we have seen, upon examination of the records, the cases would have to be remanded whenever the court should take them up and consider them four or five months hence. But it is conceded that, for some purposes, the circuit court may and will assume jurisdiction of a case before the record is filed by the removing party, and will issue such writs and make such orders as may be necessary to preserve the rights of the parties; and this from the apparent necessity of preserving those rights. That in such cases this court may and will issue or discharge writs of attachment, issue or dissolve injunctions, appoint receivers or discharge them, issue commissions to take testimony; in short, will exercise its highest authority and powers, and virtually assume full jurisdiction of the case and parties.

This in effect is the substance of the authorities cited in *Kansas & T. Ry. Co. v. Interstate Lumber Co. supra*. But will, or can a court properly exercise these high powers and functions without first inquiring and determining whether or not it has jurisdiction to make any orders in the case affecting the rights of the parties?

In the cases cited in *Kansas & T. Ry. Co. v. Interstate Lumber Co. supra*, it is evident that the record in each case, to a certain extent and in some form, fully or in brief, and by some means, must have been laid before the court, before the court could have been asked to make any orders therein. And why should a court hesitate or decline to look fully into the record, in the first instance, and determine whether or not it has any jurisdiction of the case, when, months afterwards, it must make this examination; and failing to find jurisdictional facts, must vacate

all orders theretofore made, and remand the case to the state court.

Jurisdiction, when challenged, is the first and fundamental question to be settled in all cases, and without it all proceedings are vain. Without the aid of rule 79 we would have little hesitancy in holding that these motions to remand could now be properly entertained and heard by the court. We think the statute directory, not mandatory, in requiring the defendant to file a copy of the record in the circuit court “on the first day of its next session.”

In *Baltimore R. R. Co. v. Koontz, supra*, it was held that if the removing party did not file a copy of the record on the first day of the term, it was in the discretion of the court to permit it to be filed thereafter, on cause shown.

If the statute is directory as to time, is it not equally so as to person? It certainly does not prohibit the filing of the record by any person interested other than the defendant, or at a date earlier than the first day of the next session of court. Rule 79 of this court has been in effect for ten years. It is believed that it is not opposed to, or in contravention of any statute, or of the rights of any party litigant. On the contrary, its sale, object, and purpose is to carry out the express terms of the statute, “for the advancement of justice, and the prevention of delays in proceedings.” The practical working of the rule has been most salutary, and demonstrative of its wisdom, utility, and propriety. It works no hardship upon any one not seeking *delay only*; and courts will not brook wanton delay in proceedings before them, when the opposite party is urging audience and judgment.

We are not disposed to vacate or rescind a rule believed to be wholly lawful, and in harmony with the statute, the practical effect of which is only good, and in aid of “the advancement of justice and the prevention of delays in proceedings” in this court.

Let the cases be remanded to the proper state court.

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Opinion of the Court—Deady, J.

WILLIAM H. GEST v. WILLIAM H. PACKWOOD ET AL.

CIRCUIT COURT, DISTRICT OF OREGON.

AUGUST 5, 1889.

1. **EQUITABLE MORTGAGE.** — A written agreement for security on certain property for the payment of a debt is in equity a mortgage, and will be enforced as such against all parties to the agreement, and those who have notice of it.
2. **IDEM.** — R. gave his notes to P. and C. in payment on the purchase of a mining ditch and grounds, and agreed in writing with them that if such notes were not paid when due, he would reconvey the property to them as security for their payment; the notes not being paid, R. gave C. and P. a lease of the property, with a right to apply the net profits and proceeds from year to year on these notes. *Hebl*, (1) that the agreement to give security being in equity a mortgage, the lease, with a pledge of the rents and profits, was accepted as a fulfillment of the agreement, and the agreement and lease taken together created a continuous lien on the property in favor of the payee of the notes or his assigns, from the date of the agreement; (2) that the assignment of the rents and profits of the property to the lessees for the payment of the notes created a lien on the body of the property, which, in case the rents and profits are insufficient to pay the same, may be enforced in equity; (3) during the possession under this lease the lessees were not authorized to charge the property with the expense of operating or improving it, and if the expenditures in any one year exceeded the receipts, such excess was their personal debt.
3. **STATUTE OF LIMITATIONS.** — In the consideration of purely equitable rights and titles courts of equity are not governed by the statute of limitations.
4. **EQUITABLE INTEREST IN LAND.** — The sale of an equitable interest in land is not the mere assignment of a right of action thereabout, and in a suit in a national court by the vendee, to establish his right therein, it is not material what the citizenship of his vendor is.
5. **JUDGMENT OF A STATE COURT.** — The plaintiff in a decree in a state court, given in a suit to enforce the lien of a mortgage on real property, is a proper party to a suit in a national court to enforce an alleged prior lien on the same property, and in such suit the validity and effect of such mortgage and decree may be inquired into and determined as an original question.

Before DEADY, District Judge.

Mr. Zera Snow, for plaintiff and Abell.*Mr. Charles P. Heald*, for defendant Grover.*Mr. Sidney Dell*, for defendant Packwood.

DEADY, J. This case was heard on the bill and supplemental bill of the plaintiff, Gest, the cross-bill of the intervenor, Abell, and the answers thereto of the defendants, Packwood, Grover, and Emma B. Carter, and sundry stipulations as to matters of fact. From these it appears that on February 15,

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1873, the Eldorado ditch, and certain mining property connected therewith, situated in Baker County, Oregon, and then owned by the Malheur and Burnt River Consolidated Ditch and Mining Company, and hereafter called herein the "Malheur Company," was sold to T. J. Carter and W. H. Packwood for \$43,000, on two judgments obtained on May 20, 1872, in the circuit court of the state for said county, the one by C. M. Carter for \$20,330.77, and before that date assigned to T. J. Carter, and the other by Packwood for \$17,362.18, in the aggregate \$37,692.95.

A certificate of sale was given by the sheriff to the purchasers, in which the property is designated as the Eldorado ditch, particularly described as follows: "Commencing at or near Malheur City, Shasta mining district, Baker County, Oregon, and extending to the north fork of Burnt River, via. Kuntz Creek, Deer Creek, Rock Creek, East Camp Creek, West Camp Creek, Bull's Run, and Coyote Creek, together with all the water rights and franchises thereunto belonging or in anywise appertaining thereto;" and on May 23, 1873, at Baker City, the purchasers assigned said certificate to Arthur Rice, by the following indorsement, written over their hands and seals: "For value received, and in accordance with an agreement of even date herewith, we hereby assign the within certificate of sale to Arthur Rice." Said ditch was then about eighty miles in length, and had a capacity of about one thousand two hundred miner's inches of water.

On the same day an agreement—the one referred to in the assignment—was made by Carter, Packwood, and Rice, over their hands and seals, in the presence of two witnesses, in which, after reciting the recovery of the judgments aforesaid, the sale of the Malheur Company's property thereon, and the confirmation thereof, it is stated that Carter and Packwood have sold and bargained, and by these presents do hereby sell, bargain, and convey unto "Rice the certificate of such sale;" that in consideration thereof Rice "agrees to execute and deliver" to Carter and Packwood certain promissory notes, aggregating in amount \$29,700, indorsed by Clark, Layton & Co., and payable as follows: To Carter, four notes, one for \$8,000, one for \$4,000,

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and two for \$3,000 each, to become due on the 23d of August, September, October, and November, 1873, respectively; to Packwood, four notes, one for \$2,500, one for \$3,500, one for \$3,000, and one for \$2,700, to become due on the 1st of July, October, and December, 1873, and March, 1874, respectively; that "Clark, Layton & Co. shall also indorse and acknowledge themselves bound by the terms of this agreement;" and that "in case of the non-payment of any of said notes" said Rice "shall reconvey" the property to Carter and Packwood, "by good and sufficient conveyance, to be held as security for the payment of said notes."

On the same day the notes were made, indorsed, and delivered as provided in the agreement, and an indorsement made on the latter and signed by Clark, Layton & Co., to the effect that they were the indorsers of the notes, and "acknowledge the binding force of the within agreement upon us, as such indorsers."

In all this transaction it appears that Rice was acting for Clark, Layton & Co., as well as himself, and that at the date of the assignment of the certificate and sale of the property to Rice, he paid Carter and Packwood on account thereof, in addition to the notes given as aforesaid, \$10,000 in cash.

On July 21, 1873, no redemption having been made from the execution sale to Carter and Packwood, they wrongfully, and without the knowledge or consent of Rice, obtained the sheriff's deed to the property, which fact coming afterwards to the knowledge of Rice, he had the execution of said agreement, on December 11, 1873, duly proved by the oath of a subscribing witness thereto, and on the 15th of the same month the agreement was duly recorded in the record of "Leases and Agreements" for said county; and on December 3, 1874, he caused the certificate of sale to be duly recorded in the record of "Sheriff's Certificates" for said county.

On the execution of the agreement of May 23, 1873, Rice went into the possession of the property and operated it openly and notoriously until May 4, 1874, and improved and enlarged the same at a cost of near \$15,000.

On May 4, 1874, a large portion of the indebtedness evidenced by the promissory notes mentioned in the agreement of

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May 23, 1873, being unpaid, Rice and Clark, Layton & Co. of the first part, and Carter and Packwood of the second part, for the purpose of further securing the payment of the unpaid portion of said notes and other indebtedness of said Malheur Company, and establishing certain priorities in the payment thereof, made an agreement in which it was recited, wrongfully, however, that the parties of the second part were then "the owners in fee" of the property in question; and also that on May 23, 1873, they agreed to sell the same to the parties of the first part for the consideration therein mentioned, and "delivered the possession" thereof to them, and that the parties of the second part were to convey the property to the parties of the first part on the payment of said notes; that the latter, "in addition to the possessory title to said ditch property under said agreement" of 1873, have other mines and property in the vicinity and particularly described in Schedule A, annexed thereto.

It is then stated in the agreement, that in consideration of the premises and the covenants of the parties of the second part, the parties of the first part "hereby demise, let, lease, and surrender possession, and by these presents have demised, let, leased, and surrendered the possession to the parties of the second part, of all of said property, to have and to hold the same from the date hereof, during the ensuing year, and from year to year thereafter, until the notes and demands, debts, and judgments hereinafter mentioned shall have been paid, the parties of the second part yielding and paying, as rent therefor, the net proceeds and profits of water sales from said ditches, and proceeds and profits of the workings or sales of said mining grounds, to be accounted for monthly on a gold coin basis during the mining season," to J. W. Virtue, as trustee, who shall apply the same on the debts due to the parties of the second part and others, as set forth in Schedule B, annexed to the agreement; that when said debts are paid by said "rents, proceeds, and profits," or otherwise, by the parties of the first part, the "lease shall determine," and the parties of the second part will surrender the possession of the property and convey their interest in the same to the parties of the first part.

Then follow, among others, clauses to the following effect:

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The party of the second part will construct a ditch from Eldorado ditch to the middle fork of Burnt River, a distance of about six miles, with a capacity of about three hundred inches of water, this extension to be made "as soon as snow goes off, and the cost to be considered a part of the expenses of operating said ditch this season," and "when finished, to be considered a permanent improvement of Eldorado ditch, to inure to the benefit of the parties that are or may be entitled to said ditch property;" that the parties of the second part "shall use due skill, diligence, and economy" in operating said property, and "may be allowed a superintendent's salary not exceeding \$2,000 per annum, to be considered as a part of the expenses of operating the property during the lease;" that if any of the debts mentioned in Schedule B, as due T. J. Carter, W. H. Packwood, J. W. Virtue, and J. A. Packwood, have passed to other parties, and the parties of the first part are forced to pay them in any other manner than out of the rents and profits and proceeds of the property herein mentioned, the trustee shall apply the said rents and profits coming into his hands to re-imburse the parties of the first part for such amount so paid at the time and in the order set forth in said Schedule B; "that the parties of the first part do not assume the payment" of said debts "in any other manner than out of said net rents, profits, and proceeds of said property, as fast as the same may accrue in the hands of the trustee."

Carter and Packwood went into possession under this agreement, and operated the ditch until 1880, when Carter died, and the possession and operation of the property was continued by Packwood until the appointment of a receiver on May 9, 1887.

On November 2, 1878, this suit was commenced by the plaintiff Gest, who is a citizen of Illinois, and by sufficient mesne conveyances was then and now is the successor in interest of Rice and Clark, Layton & Co., against Carter and Packwood for an accounting, and a conveyance of the legal title of the property wrongfully obtained from them by the sheriff.

Subsequently, on March 31, 1879, the plaintiff by leave of the court amended his bill, so as to make it L. F. Grover, William S. Ladd, and W. J. Leatherwood, parties defendant, with appro-

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priate allegations and prayers, to the end that a certain mortgage on the property, then held by Grover, and two judgments, held by Ladd and Leatherwood, respectively, against Carter, might be declared of no effect as against the right and interest of the plaintiff in the property. In due time the bill was taken for confessed, as against these defendants. Carter and Packwood answered, admitting the allegations of the bill generally, but alleging that the sheriff's deed was made to them without solicitation, because "they were the purchasers of the property," and stating an account, from which it appears that the expenditures incurred in the operation of the property and the construction of the extensions to the ditch largely exceeded the receipts; and thereupon the case rested until the appointment of the receiver. On January 31, 1888, Henry C. Abell, who is a citizen of Illinois, intervened, by leave of the court, and filed a cross-bill, setting up that he was the owner of the notes numbered 1 and 2 in Schedule B for \$3,000 each, made in 1873, and payable to Carter on October 23 and November 23, 1873, respectively, and alleging that as such owner he had the first lien on the corpus of the property for their payment, which he asked might be enforced. On January 21, 1888, the suit was revived against Emma B. Carter, the widow and successor in interest of T. J. Carter, who answered, admitting the allegations of the bill and submitting herself to the judgment of the court.

By the answers of Packwood to the bill and cross-bill it appears that during the period he was in possession the expenditures exceeded the receipts by \$36,586.51, for which sum he claims a first lien on the property. It also appears that much of this expenditure was caused by the construction of new or extension ditches, and that in the year 1874, when the extension to the middle fork of Burnt River was made, as provided in the agreement of that year, the receipts were \$12,235.48, while the deficit was \$15,036.74. And it also appears that in the years 1876, 1878, and 1879, the receipts exceeded the expenditures by \$828.17, \$5,001.04, and \$2,842.66, respectively, or \$8,671.87 in the aggregate.

Before the making of the agreement of 1874, the note for

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\$2,500 mentioned in the agreement of 1873, and payable to Packwood on July 1st of that year, was paid by Gest's predecessors in interest, and since the making of the same and before the commencement of this suit they paid on the notes given in 1873, and set out and numbered in Schedule B, as follows:—

No. 3, to Packwood, due Oct. 1, 1873.....	\$ 3,500 00
No. 4, “ “ (\$3,000) “ Dec. 1, 1873.....	2,951 34
.....	\$ 6,451 34
No. 6, to Virtue, due Oct. 23, 1873.....	2,200 00
No. 15, to Carter, “ Aug. 23, 1873.....	8,000 00
No. 16, “ “ “ Sept. 23, 1873.....	1,500 00

Total amount paid.....\$18,002 68

Soon after the delivery of the notes to Carter and Packwood, under the agreement of 1873 and before the making of that of 1874, Carter indorsed the notes now held by Abell and numbered 1 and 2 in Schedule B, and delivered them to his brother, C. M. Carter, on account of his indebtedness to the latter, who thereupon indorsed the same and delivered them to the First National Bank of this city as security for advances then and to be made, where they were held and remained until they were transferred to Abell for a valuable consideration, in November, 1886, indorsed in blank by T. J. and C. M. Carter. On July 6, 1887, C. M. Carter was adjudged a bankrupt in the United States district court for this district, and by the order of said court the interest of said Carter in said notes was released to said bank, on account of the indebtedness of the former to the latter, then amounting to \$8,200 with interest. Prior to Carter being adjudged a bankrupt, and after the transfer of the notes to the bank, Carter assigned his interest therein to Grover, subject to the right of the bank, and so notified the latter.

On January 4, 1874, T. J. Carter conveyed his interest in the undivided half of the property to his brother, C. M. Carter, by a deed of quit-claim, as security for an antecedent debt of \$30,000, evidenced by his note of that date, payable in one year thereafter, with interest at one per centum per month, which mortgage was duly recorded on April 17, 1874. C. M. Carter

took said mortgage with knowledge of the agreement of May 23, 1873, and the possession of the property by Rice thereunder. On April 17, 1876, C. M. Carter assigned this note and mortgage to his brother-in-law, L. F. Grover, in payment of an antecedent debt of \$6,700, who took the same with the like knowledge of Rice's interest and possession of the property that his assignor had.

On February 8, 1879, Grover brought suit in the state circuit court for Baker County to enforce the payment of said note by the sale of the mortgagor's interest in said property, wherein, on May 19, 1879, he obtained a decree against T. J. Carter for the amount of the note and interest, which decree was therein declared to be a lien on the premises from the date of the mortgage. The sale of the property on this decree was enjoined by order of this court on July 21, 1879.

On October 21, 1887, the defendant Grover, by leave of the court, filed a plea to the bill, to the effect that he is a *bona fide* purchaser for a valuable consideration without notice, and an answer in support thereof. On argument, the plea was held bad, because the consideration between Carter and Carter and the latter and Grover was only an antecedent debt, and the quit-claim to Grover's assignor was notice to him and his assigns that he purchased nothing but what his vendor had. (13 Sawy. 202; 34 Fed. Rep. 368.)

Grover then had leave to answer over, but the answer contains nothing material beyond what was in the plea and answer, except the statute of limitations, which will be noticed hereafter.

Packwood admits the case made in the bill and cross-bill, so far as the execution of the two agreements and the making and delivery of the several notes thereunder are concerned, and the transfer of those numbered 1 and 2 in Schedule B to the plaintiff in the cross-bill of Abell. But he contends that the agreement of 1874 created a trust, of which he and Carter were the trustees, and Rice and Clark, Layton & Co. the beneficiaries; that as such trustees they had a right to charge the property with the necessary cost of operating it, and that the excess of expenditures so incurred over receipts are a first lien on the property. On this theory, they seem to have incurred

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indebtedness right and left, and to have been trusted by the public without stint.

But there is nothing in the nature of the transaction, nor in the language of the instrument, that gives any countenance to this proposition. The agreement is a lease in which Carter and Packwood are the lessees and Rice and Clark, Layton & Co. are the lessors. The lessees agree to pay the lessors as rent for the property, "monthly, during the mining season," the net profits and proceeds of the property. It is styled a lease in the body of the writing, and the operative words, "hereby demise, let, lease, and surrender possession," are those of a lease. It is not only a "lease" but only a lease "from year to year," to continue, indeed, until certain debts are paid by the rent, at the option of the lessees. Therefore the deficit which the lessees have made in the operation of this property is their personal indebtedness, and they alone are responsible for it. The remedy of the lessees, if they found they could not operate the property with profit or without going in debt, was to surrender it to the lessors, which they were at liberty to do at the end of any year after it came into their possession. But as long as they operated it, each year's operations stood by itself. If there was any profit, the lessees were bound to pay it over to Virtue, the trustee for the lessors, "month by month during the mining season" of each year. The surplus of one year cannot be applied on the deficit of another. The deficit of 1874, even if caused by the construction of the extension of the ditch that year, must be borne by the lessees. True, they were authorized to make this extension by the agreement of 1874, and provision was made therein, that the cost of such construction should be considered a part of the expenses of operation for that year. The necessary implication from this limitation, as well as the manifest purpose and intent of the whole contract, is, that the lessees were not authorized to make any other extension of the ditch at the expense of the receipts or proceeds of the property, and this only from the receipts of that year.

It follows that the surplus of receipts over expenditures in the years 1876, 1878, and 1879, amounting to \$8,671.87, are net profits, and should have been paid over to the trustee and

applied on the notes of the lessors, as provided in the agreement of 1874. And for the purposes of this case, equity will consider that done which should have been done. This surplus will then be treated as having been applied on the notes first due, but still in the hands of Packwood or Carter. To apply it on notes previously assigned by them, as notes 1 and 2, would give them the benefit of it twice. Having already appropriated this surplus to their own use, they can only be made to account for it, by applying it on such of the notes as have not been assigned. These are notes 4 and 5, payable to Packwood, December 1, 1873, and March 1, 1874, respectively. On note 4 the sum of \$2,951.34 was paid by Gest's predecessors in interest, leaving \$38.66 due thereon. Note 5 is for \$2,700, which makes \$2,738.66, plus the interest thereon. The surplus applied in payment of this amount, as and when it occurred, will much more than satisfy it. The amount due on these notes, less the payment on 4, must therefore be considered paid at the time this surplus accrued, and should have been paid over to the trustee.

This leaves notes 1 and 2 unpaid in the hands of Abell, for which he claims the first lien on the property. Gest, as the successor in interest of Rice and Clark, Layton & Co., also claims a lien on the property for the sum of \$20,651.34, plus interest at the rate of ten per centum thereon from the date of the filing of the bill, which is the sum theretofore paid by said Rice and Clark, Layton & Co. on notes 3, 4, 6, 15, and 16, under the clause in the agreement of 1874, providing in effect that if they paid any of these notes otherwise than from the rent of the property, they should be subrogated to the rights of the creditors thus paid and be re-imbursed out of the net profits and proceeds, according to the priority of the debt thus paid.

By the purchase of the property at the sale on execution, Carter and Packwood acquired an estate or interest in the premises which could be sold and passed to others. (*Page v. Rogers*, 31 Cal. 305.) Unless redeemed within the time prescribed by statute, they were entitled to a conveyance of the legal title to the property, and in the mean time were entitled to the possession thereof. (Comp. 1887, secs. 304, 307.)

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The agreement of 1873, together with the formal assignment of the certificate of sale, and the possession taken thereunder, was in legal effect a sale of this property, with a complete right in the vendee, Rice, to demand and have the sheriff's deed thereto in place of the vendors. (*Page v. Rogers, supra.*) The purchaser at an execution sale may assign or dispose of his right thereunder, and it is the duty of the officer to make and deliver a deed to the property accordingly. (*Voorhees v. Jackson ex dem. Bank of United States*, 10 Peters, 479.)

By the wrongful conduct of the vendors they obtained the sheriff's deed instead of the vendee. But equity will treat them as mere trustees of the legal title thereby acquired, for the benefit of the latter.

It was the evident intention of the parties to the agreement of 1873 that the notes given thereunder for the purchase price of the property should be secured by a lien thereon. To this end it is provided that in case of the non-payment of any of them, the property shall be *reconveyed* to the vendors, "to be held as security for the payment of the same." Nor was it to be "reconveyed" absolutely, but only as "a security for the payment of the notes."

The contemplated contingency actually happened. Only the first note was paid when it became due; and the agreement of 1874 which followed was the *reconveyance* or security, which the parties finally concluded to give and take. The provision in the agreement of 1873 was, in effect, a contract for a mortgage, that the property should in some way be returned to the vendors as a security for the payment of the notes, and the lease of 1874 was the fulfillment thereof.

As against the vendee, the vendors had a lien on this property for the payment of these notes from the time of their delivery to them, which equity will treat as a mortgage. As was said by Mr. Justice Story, in *Flagg v. Mann*, 2 Sum. 533: "If a transaction resolves itself into a security, whatever may be its form, it is in equity a mortgage." To the same effect is 1 Jones on Mortgages, section 168, et seq., and 3 Pomeroy's Equity, sections 1235, 1237. The instances and illustrations given by Pomeroy "show," as he says (sec. 1237), "that the form is imma-

terial if the intent appears to make any identified property a security for the fulfillment of an obligation.”

The agreement of 1874 does not abrogate or destroy that of 1873, or anything that was done under it, nor does it profess to. Notwithstanding the misrecitals in the former, the vendees, under the latter, still act and are treated as the practical owners of the property, and lease the same to the vendors, as a means of furnishing the security for the payment of the notes contemplated in the agreement of 1873. That security consisted of the possession of the property with a right to operate it, and through the instrumentality of the trustee, Virtue, to apply the rents coming to the lessors to the payment of the notes in the order set forth in Schedule B. The one agreement is an addition to and fulfillment of the other, and they must be construed and have effect as *in pari materia*.

This security, as bargained for in the agreement of 1873, and furnished by that of 1874, was intended for the payment of the notes into whosoever's hands they might come. It was given for the benefit of the notes, and not that of Carter and Packwood, or any other person, only as and while they were the holders of them. (*Phelan v. Olney*, 6 Cal. 478; *Pattison v. Hull*, 9 Cowen, 747; *Grattan v. Wiggins*, 23 Cal. 30.)

On the transfer of any of the notes the security bargained for in the agreement of 1873 followed it as an incident of the debt, and when the security was formally furnished by the agreement of 1874, it followed the notes in the hands of third persons in the order prescribed in Schedule B, unless indorsed without recourse, even if they were ignorant of its existence. (*United States v. Hodge*, 6 How. 279.)

The security bargained for in the agreement of 1873 was the *reconveyance* of the property sold, for the purchase price of which the notes were given. The security actually given by the agreement of 1874 was a lease from year to year, with a pledge of the net profits and proceeds of the property until the debts were thereby paid. This was a continuing pledge, so far as the lessees were concerned, as long as any one of the notes was unpaid. And in equity it will be considered, if necessary

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for the security or payment of the notes, as a pledge of the corpus of the property.

“An assignment of the rents and profits of land as security for a debt is another mode of creating an equitable lien in favor of the assignee; and the assignment of a lease by way of security produces the same effect.” (3 Pomeroy's Equity, sec. 1237.) In *Ex parte Wells*, 1 Ves. 162, Lord Thurlow, in speaking of an assignment of rents and profits as a security, said: “It is an old way of conveying, but it amounts to an equitable lien.” (See 2 Story on Equity Jurisprudence, secs. 1064, 1064 a; 1 Jones on Mortgages, secs. 162, 171; *Charter Oak etc. Co. v. Stephens*, 15 Pac. Rep. 253, Utah, October 17, 1887.)

In the latter case it was held that where a writing provided certain advances made to a mining company should be repaid out of “the rents, issues, and profits,” and the same were not sufficient for that purpose, a suit might be maintained to subject the mining property itself to a lien for the payment of such advances.

This case is strongly in point. It appears that the mining ground on which the profits of this ditch depends is substantially disposed of and worked out; that the ditch itself has been allowed to fall into disuse and decay, and the profits derived therefrom cannot be made to pay the interest on the schedule debts.

It follows that Abell is entitled to enforce this lien against the property so far as may be necessary to secure the payment of notes 1 and 2, now held by him; and Gest, as the successor in interest of Rice and Clark, Layton & Co., has a lien on the property for the re-imbusement of the amount paid by them on notes 3, 4, 6, 15, and 16 of the Schedule B.

Except as to note 6, for \$2,200, which was payable to Virtue October 23, 1873, and was not mentioned in the agreement of 1873, the mortgage to C. M. Carter is subordinate to this lien. It is subsequent in point of time to the agreement of 1873, and must be postponed to the lien and security thereby created. But it is claimed that the agreement of 1873 was superseded by that of 1874, and the security provided by the latter substituted for the former, by which means the mortgage to Carter became the prior lien.

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In my judgment there was no gap between the operation of the two agreements so as to give priority to the mortgage over the latter. The security for the payment of the notes was bargained and provided for in the agreement of 1873, which equity will treat as a mortgage. By the agreement of 1874 this bargain was completed by the creation of a specific security on the property, namely, a lease of the same, with the right to apply, through a trustee, the rent in payment of the notes. There was no instance of the intervening time in which the lien was not in existence, and the agreement of 1874 did not create it, but only gave it specific form and provided means for its discharge. The agreement of 1873 was, as now appears, duly proved and admitted to record before the execution of the mortgage, besides which, the mortgagee had actual notice of the agreement of 1873, and the possession of the venders under it; and his assignee, Grover, had the same notice.

But the mortgage having been both taken and assigned for an antecedent debt, neither the mortgagee nor his assignee is a purchaser for a valuable consideration. Admitting, for the present, that the record of the agreement of 1873 was unauthorized (*Gest v. Packwood*, 13 Sawy. 202; 34 Fed. Rep. 371), this circumstance is sufficient in itself to postpone the mortgage to the equities arising under the agreement of 1873, and recognized and provided for in that of 1874, in favor of the notes mentioned in the former, while in the hands of any one except the mortgagor. (*People's Sav. Bank v. Bates*, 120 U. S. 556.) And the mortgage having been made by deed of quit-claim, the mortgagee and assignee thereby had notice that they only took what was left in T. J. Carter to convey. (*Baker v. Woodward*, 12 Or. 10.) This was nothing but the dry legal title to the undivided half of the property, which in equity he held as trustee for his prior vendees under the agreement of 1873. (See *Gest v. Packwood*, 13 Sawy. 202; 34 Fed. Rep. 368, where this subject is considered at length on the plea of Grover to the bill.)

And now it is said that this court has no jurisdiction over the Carter mortgage, because it has become merged in the decree of the state circuit court for the county of Baker, and thereby become a valid lien on this property from the date of its exe-

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cution. The argument in support of this proposition seems to be based on the fact that section 720 of the Revised Statutes prohibits this court from granting a writ of injunction, "to stay proceedings in any court of a state," except in bankruptcy proceedings. The decree in the state court was given by default. None of the parties to this suit, except Carter, were parties to that, and are not bound by the decree therein. This is not a suit to stay proceedings in the state court. The proceedings in that court were commenced after this suit was begun, and have long since terminated, unless the sale of the property by the sheriff is a part of such proceedings within the meaning of the statute, which is not admitted. The sheriff and the defendant Grover appear to have been enjoined at an early day in the case, without objection, from making any sale of the premises under the decree of the state court. But the owner of the mortgage and the plaintiff in the decree for its enforcement, or his assignee or vendee, if the decree had been assigned or the property sold thereon, is a proper party to this suit, in which the validity and effect of the mortgage and decree may be inquired into and determined as between the parties hereto, without staying proceedings in the state court.

The decree of the state court, as against the persons who were not parties to the suit therein, is of no more force or effect than the mortgage itself. And if there had been a sale on it, the vendee thereat would have occupied the same position in this suit, if made a party to it, that Grover does now. The sale would only have passed the interest in the property conveyed by the mortgage, the dry, legal title to the undivided half of the property, subject to all the equities existing between the mortgagor and his prior vendees.

The statute of limitations is pleaded to the cross-bill of Abell in the answers thereto.

In the consideration of purely equitable rights and titles, equity acts in analogy to the statute, but is not bound by it. (*Hall v. Russell*, 3 Sawy. 515; *Manning v. Hayden*, 5 Sawy. 379.) The right of Abell, as the assignee and holder of notes 1 and 2 of Schedule B, to have the same first satisfied out of the property, is a purely equitable one, resting ultimately on the

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fact that by the agreement of 1873 an equitable lien or mortgage was created on the property as a security for their payment, which security was recognized and continued by the agreement of 1874, and which, on the failure of profits and proceeds, he is entitled in equity to enforce against the corpus of the property.

Abell's right to intervene in this suit on leave of the court, by cross-bill, is recognized in the courts of equity. It depends on the fact, that as the holder of the notes 1 and 2, he has a lien on the property which is the subject of the litigation. In this proceeding and by this means, he may obtain the same relief as if he was an original party plaintiff. (*Bronson v. La Crosse Ry. Co.* 2 Black, 524; *French v. Gapen*, 105 U. S. 509; *Savannah v. Jessup*, 106 U. S. 563; *Williams v. Morgan*, 111 U. S. 685.)

The only question in the case in this connection is, has Abell or his assignors been guilty of laches in asserting this claim, whereby it has become stale?

No claim of personal liability is sought to be enforced on these notes against any one. The direct remedy on the notes against the parties thereto is barred long since.

The relief sought is simply the enforcement of the lien on the property, created to secure their payment. This lien, in my judgment, is a *vivum vadium*, or living pledge, and continues as long as the pledge of "net profits and proceeds." This pledge had no defined limit of time, and could only terminate with the payment of the notes, or by the rescission of the agreement creating it, at the option of the lessees, who might refuse to continue in possession as such at the end of any year.

The notes have not been paid and the lessees have not surrendered the lease; and while Abell or his assignors might have sooner asserted their right to enforce the payment of the notes out of the corpus of the property, on the ground that the "net profits and proceeds" under the management of the lessees had proved altogether inadequate thereto, they were not, in my judgment, bound to do so.

On the final hearing it was claimed on behalf of the defendant Grover, that the relief now sought by the plaintiff Gest,

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in the supplemental bill, is inconsistent with the case made and the relief prayed in the original bill, and therefore cannot be allowed. For this proposition, *Shields v. Barrow*, 17 How. 130, is cited and relied on.

But no objection was made to the filing of the bill at the time the application therefor was made, and it is a question whether the objection does not come too late now.

But waiving this there is nothing in the objection. The plaintiff Gest, finding from the answer of Carter and Packwood that there were no "net profits or proceeds" of the property, and that they claimed there was a large deficit, allowed the suit to rest for some years. Afterward Abell was allowed to intervene for his interest and file a cross-bill, and it appearing that he was entitled to a sale of the property to enforce the payment of his notes, and it further appearing that in the mean time the property had so depreciated in value and productiveness that it could not be made to pay the whole of the indebtedness mentioned in Schedule B, the only relief which Gest could obtain under the circumstances was the re-imbursement out of the proceeds of the property of the sum advanced by his predecessors in interest in payment of certain of the notes in said schedule, as provided in the agreement of 1874. The supplemental bill was allowed on the theory that it did not make a new case, but would enable the court to give the plaintiff that measure and kind of relief, which under the circumstances was proper and possible. *Hardin v. Boyd*, 113 U. S. 756, is a late and instructive case on this subject, and very much in point.

There the bill alleged that a bond for a conveyance of land had been obtained from the vendor by fraud, and that the purchase price had not been paid according to the contract, and prayed that the bond might be canceled for an account of the rents and profits and the amount paid on the purchase, that the title of the plaintiffs be quieted as against the vendee, and "such other relief as equity may require." At the final hearing the plaintiffs were permitted to amend the prayer of the bill, so as to ask in the alternative for a decree for the balance of the purchase money, and a lien on the land to secure the payment of the same.

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On appeal, the supreme court affirmed the allowance of the amendment, saying, in effect, that it did not make a new case, but only enabled the court to adapt its relief to that made by the bill and sustained by the proof.

And finally, it is now objected that the plaintiff is simply the last assignee of a contract or contracts for the title to, or interest in real property, and as it does not appear that all the assignors could have maintained this suit on the ground of their citizenship, he cannot do so. It was stated by counsel on the argument, and not denied, that as a matter of fact, all such assignors had the citizenship to enable them to maintain this suit.

But it is not so alleged in the bill, which is drawn on the theory that the plaintiff is, and those through whom he claims were successors in interest of Rice and Clark, Layton & Co., and not assignees of a mere right of suit on a contract to convey. And so the bill alleges that since May 4, 1874, the plaintiff Guest, "by a regular chain of conveyances and assignments," has acquired "all the right, title, and interest" which Rice and Clark, Layton & Co. then had in said property, or the rents, issues, and profits thereof. This being so, he is the owner of the property in equity, subject to the lease made to Carter and Packwood. The legal title was wrongfully obtained by the latter after their sale to Rice, and they hold the same in trust for their vendee. A sale and conveyance of the property to Gest under such circumstances, or of all the right, title, and interest of Rice and Clark, Layton & Co. therein, is the sale and conveyance of the beneficial interest in the property and not the mere assignment of a right of action thereabout. (*Manning v. Hayden*, 5 Sawy. 363; *Perry on Trusts*, sec. 227.) This author says: "The right of a party who has been defrauded of the title to his land is not a mere right of action to set the deed aside, but it is an equitable estate in the land itself, which may be sold, assigned, conveyed, and devised." (See, also, *Bean v. Smith*, 2 Mass. 268; *Donald v. Smalley*, 1 Peters, 620.)

A decree will be entered that the property be sold by the master clear of all liens, claims, and encumbrances held, claimed, or owned by the parties to this suit, or any of them,

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and that the proceeds of such sale be applied as follows: (1) To the payment of the taxable costs and disbursements of the plaintiff and the plaintiff in the cross-bill, including any unpaid expenses of the receivership; (2) to the payment of the notes 1 and 2 to the plaintiff in the cross-bill, Henry M. Abell, with interest at the rate of ten per centum per annum from date; (3) to the payment to the plaintiff, William H. Gest, of the sum of \$18,002.68, with interest at the rate of ten per cent per annum from the date of the filing of the bill herein, the same being the amount paid by Gest's predecessors in interest on notes 3, 4, 6, 15, and 16, in Schedule B of the agreement of 1874, and made and delivered in pursuance of the agreement of 1873; and (4) to the payment of the sum due the defendant Grover, on the note and mortgage assigned to him by C. M. Carter, and the remainder of the notes in Schedule B, and not otherwise herein provided for in equal parts; *provided* that note 6 in said schedule, payable to J. W. Virtue, on October 23, 1873, for \$2,200, be first paid to the plaintiff Gest, with interest from November 2, 1878, out of said proceeds, equally with said note and mortgage.

The surplus of \$8,671.87 is hereby first applied on notes 4 and 5 in said schedule, as of the respective years in which it accrued, and the remainder on the notes in said schedule not herein specially named and otherwise provided for, as therein numbered, and for all the exigencies of this suit, and the distribution of the proceeds of the sale herein, this surplus shall be taken and deemed to have been duly applied as herein directed, when and as it accrued.

THE BRUNSWICK BALKE COLLENDER CO. v. EMANUEL
BRUNSWICK.

CIRCUIT COURT, NORTHERN DISTRICT OF CALIFORNIA.

AUGUST 5, 1889.

Before SAWYER, Circuit Judge.

Mr. Philip G. Galpin, for complainants.

Mr. Jno. L. Boone, for defendant.

SAWYER, Circuit Judge. Upon a careful examination of patent No. 119,262, issued to defendant, Brunswick, and patent No. 203,108, issued to Boyle, and held by complainants, and sued on in this case, I am satisfied that the manufacture of tables under the former would constitute no infringement of the latter. The construction of the two tables are not only materially different, but they operate differently, and the claim of the combinations found in the latter patent are limited by the description of the construction given in the specifications, and the purpose stated, and the language used in the conclusion of the claim referring to the arrangement and operation, viz., "the whole arranged to operate as specified for the purposes set forth." The disclaimer also, I think, reaches the case. The claimant says, in term, after mentioning the elements of the combination, as contained in former tables, "I do not wish to be understood as claiming such construction broadly," that is, the combination claimed in the broadest sense. He, evidently, limits his claim to his peculiar construction and operation.

In rendering the former decisions the patent No. 203,108 was discussed with reference only to patent No. 321,004 involved in the case. No. 119,262, not being before the court, no reference was made to it in the decision.

As the latter patent is in no way affected by the decision, there is no occasion for a rehearing for its protection.

Let a rehearing be denied.

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AUSTIN v. GAGAN ET AL.

CIRCUIT COURT, NORTHERN DISTRICT OF CALIFORNIA.

AUGUST 5, 1889.

1. **REMOVAL OF CAUSES—CASE ARISING UNDER UNITED STATES STATUTE—PETITION.**
—In order to remove a cause from a state to a United States court, under the act of 1887, on the ground that it arises under a statute of the United States, the record must affirmatively show, from the facts alleged, that some disputed construction of the statute will arise for decision in the case.
2. **SAME.**—Where the contest is about the facts only, the law being undisputed, there can be no removal.
3. **SAME—TIME OF APPLICATION—SUBSEQUENT EXTENSION OF TIME TO PLEAD.**—
The application for removal, under the act of 1887, must be made at or before the expiration of the time to answer, as prescribed by the statute or rules of court in force at the time of the service of the summons. Subsequent extensions of time to answer by special orders of the court, or by stipulations of the parties, cannot extend the time to apply for a removal under the statute.
4. **SAME—TIME TO FILE BOND.**—The bond required by the statute, as well as a petition, must be filed at or before the time for answering expires, to effect a removal.
5. **SAME—FILING NUNC PRO TUNC.**—The court cannot, by an order made after the time to answer has expired, directing the bond to be filed *nunc pro tunc* as of a day prior to such expiration of time, cut off the right of the plaintiff to remain in the state court, which has already become vested and fixed under the statute.

Before SAWYER, Circuit Judge.

On motion to remand.

Mr. James G. Maguire, for the motion.*Mr. F. I. Wilson*, contra

SAWYER, Circuit Judge. One ground of the motion, is, that the petition does not present a case, which appears from the facts stated, to arise under the laws of the United States. One party claims the land in dispute as a homestead, and the other that the land is mineral, and, therefore, not subject to be entered as a homestead. But it does not appear from any facts stated, that there is any disputed construction of either statute under which the respective parties claim. For anything that appears, both parties may agree as to the construction of the statutes, and the whole case turn upon a question of fact, as to whether the land is mineral land or not, or whether either party has performed the acts conceded to be necessary to give the right claimed.

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Indeed, I infer from the facts stated in the petition, that the contest will really be upon the facts, and not upon the law. In my judgment the record does not present a case for removal under the decision in *Trafton v. Nougues*, 4 Sawy. 178, which was followed by Justice FIELD in *Gold Washing & Water Co. v. Keyes*, whose ruling was affirmed in 96 U. S. 199. (See, also, *McFadden v. Robinson*, 10 Sawy. 398; *Hambleton v. Duham*, 10 Sawy. 489; and *Theurkauf v. Ireland*, 11 Sawy. 512, to the same effect.) Under any other rule the circuit court would have jurisdiction—at least until the want of jurisdiction is disclosed at the trial—in every action of ejectment, where either party traces titles to a United States patent, no matter what the matters of contest may be, and thus nearly all the litigation respecting titles to lands lying west of the Alleghany Mountains might be swept into the national courts.

The jurisdiction should affirmatively appear upon the record from the facts stated, and not from the mere statement of the conclusion of the petitioner. The petition is insufficient in this respect.

The summons was served on April 8, 1889, which required the parties to appear and answer in pursuance of the provisions of the statute of California, within ten days after service of summons. The time for answering, then, under the laws of California, expired on April 28th. The time for answering was extended from time to time by stipulation of parties till May 29th. On the latter day the defendants answered, and at the same time filed their petition for removal. This was not in time. The party must file his petition for removal “at the time, or any time before the defendant is required by the laws of the state, or the rules of the state court in which the suit is brought, to answer, or plead to the declaration or complaint of plaintiff,”—not at or before the expiration of the extended time within which parties may choose to stipulate for filing an answer or demurrer. The statute means at any time before the defendant is required to answer by the laws of the state, when the time is specially regulated by the statutes, and by the general rules of practice governing the matter adopted by the courts, when the matter is thus regulated, instead of by specific

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statutes of the state,—not within the time provided by special orders extending the time, or application by or stipulations of the parties. As we said in *Dixon v. Telegraph Co.* 38 Fed. Rep. 377, *ante*, page 17, the prior act allowed the petition to be filed at any time during the term at which it might first be tried. But the supreme court, repeatedly, held, that the act meant the term at which it could be first at issue, and be ready for trial, provided the parties filed their pleadings at the time appointed by law, whether the court, or the parties were ready for trial or not. And it was also held that the extension of the time of joining issue by orders of the court, or a stipulation for time between the parties, could not extend the time for filing a petition for removal to the next term. (*Pullman Palace Car Co. v. Speck*, 113 U. S. 84; *Gregory v. Hartley*, 113 U. S. 746.) And this has often been the ruling in this court, as will be seen by consulting the reports of its decisions. Even the statute as thus construed was deemed by Congress to be too liberal, and in 1887 the act was amended so as to require the petition to be filed at or before the time when the law or established rules of court required the defendant to plead. This law must be construed in the same way as the former, as to the matter of extending the time to plead by the court, or by stipulation of the parties. The party must make his election, and file his petition at or before the time when his pleading is first due under the law, or rules as they exist when service of summons is made, or he waives his right to a removal. This must be the rule, or the parties by stipulation, or the court by special orders, on their application, may extend the time to apply for a removal, indefinitely, and the policy of the law be thereby defeated. (See, also, *Keeney v. Roberts*, and cases cited, 12 Sawy. 39, and *Theurkauf v. Ireland*, 11 Sawy. 512.)

The policy of the law is to require parties to take the first opportunity to change the forum, and in default thereof the right is waived. Under the old law the party was compelled to elect upon first appearing. The petition is too late, and the case improperly removed on that ground also. The bond filed with the petition on the last day of the time to answer as extended by the stipulation contained no amount of money, an

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unfiled blank having been left, so that it did not appear for what money the obligors were bound. Afterwards, on June 27th, another bond was filed reciting the defect in the first bond filed, and that this bond, which was in due form, was filed in place of the prior bond. The court made an order that it be filed *nunc pro tunc* as of May 27th. But clearly the court could not, by this order, give the bond a retroactive effect, so as to cut off a right which had vested in the mean time. Now the first bond was effective, or it was not. If it was effective, there was no necessity for the second, and it was useless. If it was not effective, then the case was not removed by the filing of the petition, or until after the filing of the new bond, and this was long after the expiration of the time prescribed by the statute, and the right of the plaintiff to remain and litigate his case in the state court had become vested and fixed. It was not thereafter in the power of the court to divest it by this or any other order. The case was not in fact or in law removed until after the time for removal had expired.

That the bond was necessary to effect a removal seems clear. The statute provides for the filing of both a petition and bond containing certain prescribed conditions. The required petition and bond having been filed within the time prescribed, the statute proceeds: "It shall THEN be the duty of the court to accept the said petition and bond, and proceed no further in such suit;" that is to say, after filing of the prescribed petition and bond, but not till "then." (See Desty, Removal Cas. 142.) The filing of a bond is required by the same language as the filing of a petition, and it must receive the same construction with reference to the bond, as with reference to the petition.

The paper filed as a bond was so radically defective in matters of substance that it was no bond at all. Consequently, no bond was filed till a month after the stipulated extension of time to answer had expired, and two months after the lapse of the statutory time. It was therefore without effect. In *Burdick v. Hale*, 7 Biss. 26, the bond, like that under consideration, had no sum specified—the place for the amount being left blank—and Circuit Judge Gresham, and I think rightly, held the defect to be fatal, as the court was not authorized to dispense

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Points decided.

with any substantial condition to a removal required by the act. In *Torrey v. Locomotive Works*, 14 Blatchf. 269, Judge Blatchford, now of the supreme court, made a similar ruling as to a less vital defect in the bond. A similar decision was made in *McMurday v. Insurance Co.* 4 Week. N. Cas. 18. Judge Coxe in the circuit court, Northern District of New York, approved and followed these decisions with reference to a bond which made no provision for payment of costs. (*Webber v. Bishop*, 13 Fed. Rep. 49.) So Field, in his treatise on Jurisdiction of the Federal Courts, says: "If the bond is manifestly defective, as where no sum for the penalty is inserted, this would be ground for remanding the case to the state court from which it come." (Sec. 190. See, also, sec. 178, p. 156.) There are some decisions holding that slight defects may be cured, as in *Harris v. Delaware etc. R. R. Co.* 18 Fed. Rep. 833, and cases cited. But none of them are cases where substantially there was no bond at all, till long after the time for removal had expired. In my judgment, the court cannot dispense with any substantial condition to a removal required by the statute, and cannot supply a substantial condition after the time for removal has expired, and the right of the other party has attached. For all of the various reasons indicated, a removal was not effected. The cause must, therefore, be remanded with costs, and it is so ordered.

HENRY D. HARRISON v. PETER ULRICHs ET AL.

CIRCUIT COURT, SOUTHERN DISTRICT OF CALIFORNIA.

AUGUST 12, 1889.

1. PATENTS ISSUED ON MEXICAN GRANTS.—In an action of ejectment for land in California, where both parties assert title to the premises, under patents of the United States, issued upon concessions of former governments, confirmed by the tribunals of the United States, the controversy can only be determined by reference to those concessions, or by the proceedings had for their recognition and confirmation under our government.
2. EFFECT OF PATENT ON GRANTS UNDER LAWS OF 1824 AND REGULATIONS OF 1828, WITH JURIDICAL POSSESSION, ETC.—EFFECT OF SUBSEQUENT PATENT ON SUCH A PATENT.—A grant made by the superior political chief of the territory of Upper California, in conformity with the colonization law of Mexico of 1824 and the executive regulations of 1828, followed by the ceremony of juridical posses-

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sion, by which, after citation to the neighboring proprietors to be present at the proceeding, the land was measured, its boundaries marked, and the grantee put in possession, vested the title in fee in the grantee, subject only to the possibility of its being divested, by the refusal of the departmental assembly to give its approval to the grant. A patent of the United States, issued upon a title of that character, confirmed by the tribunals of the United States, and located by the executive officers of the United States, is unaffected by a subsequent patent, based on a confirmation of a title, depending upon the validity of an order made by a governor of California commissioned by the Spanish crown, which order did not in itself convey any interest in the land, and was not followed by any proceeding which purported to have that effect.

8. **EFFECT OF POSSESSION UNDER LAW OF MEXICO, UNDER INSTRUMENT NOT CONVEYING TITLE.**—Under the law of Spain and Mexico, mere possession, however long continued, of any portion of public domain, under an instrument which did not purport to transfer the property, did not create a title which would enable the possessor to hold the land against the Spanish crown, or against the Mexican government.
4. **DUTY OF GOVERNOR UNDER REGULATIONS OF 1828 RESPECTING GRANTS ISSUED BY HIM.**—Under the regulations of Mexico of 1828, it was the duty of the governor, and not of the grantee, to submit to the departmental assembly grants issued by him, for their approbation. His neglect in this respect suspended the definite validity of the grant; that is, prolonged the liability of the estate to be defeated by the action of the assembly and of the supreme government thereon, but did not operate to divest the estate, already vested in the grantee.
5. **PATENT OF UNITED STATES TO LAND ON CONFIRMED GRANT MADE UNDER LAW OF 1824 PASSES TITLE.**—By a patent issued by the United States, upon a grant, made in conformity with the colonization law of 1824, followed by the ceremony of juridical possession, confirmed and located by the United States, whatever title is in the United States passes to the patentee. After a patent so issued, no title remains in the United States, which they could convey by any subsequent patent. However conclusive against the United States, and parties claiming under them by title subsequent, a patent may be, it in no respect impairs the right of a previous patentee to contest the title upon which the subsequent patent has issued for the premises.
6. **POWER OF POLITICAL CHIEF OF UPPER CALIFORNIA TO ALIENATE LAND, DOUBTED.**—Whether the political chief of the territory of Upper California, under the Spanish crown, possessed any power to alienate the fee of any portion of the public domain, *doubted*.

Before FIELD, Circuit Justice, and SAWYER, Circuit Judge.

Mr. William Matthews, and Messrs. Wells, Van Dyke & Lee,
for plaintiff.

Messrs. Rhodes & Barstow, Messrs. Chapman & Hendricks, and
Mr. J. W. Towner, for defendants.

FIELD, Circuit Justice. This is an action for the possession of land in the county of Los Angeles, California, amounting to 13,723 acres and a fraction of an acre. It is submitted to

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the court without the intervention of a jury, by stipulation of the parties. The complaint alleges ownership in fee of the demanded premises by the plaintiff, on the first day of July, 1886, and the wrongful and continued exclusion of him from them ever since by the defendants, to his damage of ten thousand dollars (\$10,000). The answers controvert all the allegations of the complaint, and also plead the statute of limitations in bar of the action. No testimony was offered in support of this plea, and it must therefore be considered as abandoned.

The plaintiff deraigns whatever title he possesses to the land by two patents of the United States, each for an undivided half of a tract known as the rancho Las Bolsas; one issued June 19, 1874, to Ramon Yorba and others; the other issued August 27, 1877, to Juan Jose Murillo and his wife. Both of these patents embrace the demanded premises.

The defendants who have not disclaimed, or against whom the action has not been dismissed, were in possession of the premises at the commencement of the action, and claim title to them through a patent of the United States issued December 21, 1883, to Bernardino Yorba and others, for a tract known as the rancho Santiago de Santa Ana. This patent also embraces the demanded premises.

As the patents of both parties cover the land, the controversy can only be determined by reference to the concessions of the former government, or by the proceedings for their recognition and confirmation taken under our government. The patents are based upon the supposed validity of the asserted title or equity of the patentees when the jurisdiction of Mexico passed to the United States. Whoever previously possessed the better right to the possession of the lands would have been maintained by the government of that country in his claim against contestants. And those who have succeeded to that better right are entitled under our government to the like protection. The patents were not issued until those concessions had been recognized by the tribunals of the United States as genuine and as conferring a right or equity upon the respective claimants, which was entitled to protection under the act of March 3, 1851. It was not the purpose of that act, or of the proceedings under it,

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to supersede rights or equities relating to lands conferred by the former government, but to confirm and perfect them by giving the holder such record or documentary evidence of their validity as would enable him to enforce them in the courts of the country. We must, therefore, look into the character of those concessions, and if they furnish no solution of the matter in contention, we must consider the effect of proceedings had before the tribunals of the United States upon their respective pretensions. (*Henshaw v. Bissell*, 18 Wall. 255, 266.) Nearly all the original documents issued by the former government, or certified copies thereof, have been produced in evidence, as well as attempted translations of them. These translations, it is true, are in bad English and are often inaccurate. We cannot, however, be misled by them, for we have the originals, or copies, to which we can refer to verify or correct them.

Turning to those concessions, and looking first to those produced on behalf of the plaintiff in support of his contention, we find the facts to be substantially as follows:—

In 1784 one Manuel Nieto, a subject of Spain, obtained from Pedro Fages, then military governor or commandant of California, under the Spanish crown, a concession of some kind relating to a large tract of land within the present county of Los Angeles, embracing about thirty-three square leagues. This concession is not in evidence, and we are only made acquainted with its character by references to it in other documents of admitted genuineness before us. It gave to Nieto permission to occupy the land, but from what subsequently took place it is evident that it did not purport to pass the title to him, although in proceedings before the land commission it is often spoken of as a grant, vesting the fee or ownership in him. Under the concession Nieto entered upon the land and continued in its occupation until his death in 1804. It would also seem from these documents that Nieto left surviving him four children, Jose Antonio, Juan Jose, Manuela, and Antonio Maria, who continued in possession of the land after his death; and that in 1832 two of these, Jose Antonio and Antonio Maria, died, leaving widows surviving them. In the following year, 1833, on the twenty-sixth day of July, one Luciano Grijalva, representing

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the interests of Juan Jose Nieto, presented a petition to Jose Figueroa, then superior political chief of the territory of Upper California, in which he recited the concession of Governor Pedro Fages to Manuel Nieto, the latter's possession of the land, his death, and the subsequent uninterrupted occupation by his heirs, and prayed, in order that they might enjoy the favor conceded to their father, that separate titles be given to each of them for the several parts corresponding with those designated on an accompanying map, as follows: The tract of Santa Gertrudes, to Doña Josefa Cota and her children, as widow of the deceased Antonio Maria Nieto; the tract of Las Bolsas to Doña Catarina Ruiz and her children, as the widow of the deceased Jose Antonio Nieto; the tract of Los Cerritos to Doña Manuela Nieto; and the remainder, which comprehended the tracts Los Coyotes, Alamitos, and Palo Alto, to Don Juan Jose Nieto, who, as head of the family, had determined upon this division for the benefit of its members. To avoid all ground of dispute, he asked that possession be given to each one of his or her portion thus designated. On the subsequent day, July 27, 1833, the political chief made a decree reciting the former concession by Governor Pedro Fages to Manuel Nieto, and the peaceable and uninterrupted possession by which he and his heirs had enjoyed the fruits of the lauds, and declared them—the parties for whose benefit the petition was presented—owners in fee of the premises, designating the portion granted to each, namely: To Juan Jose Nieto, the tracts called Los Coyotes, Alamitos, and Palo Verde; to Doña Manuela Nieto, the tract called Los Cerritos; to Doña Josefa Cota, widow of Don Antonio Maria Nieto, the tract called Santa Gertrudes; to Doña Catarina Ruiz, the widow of Don Jose Antonio Nieto, the tract called Las Bolsas. The governor also directed that titles for these several tracts should be issued to the parties, in order that juridical possession might be given to them. On the 22d of May, 1834, pursuant to this decree, formal grants were issued by him to the parties—to each one for his or her separate portion—and among them one to Doña Catarina Ruiz for the tract “known by the name of Las Bolsas, bounded by the tracts of Los Alamitos and Los Coyotes, the river Santa Ana, and the coast,” he declaring, by

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virtue of the authority conferred upon him by the decree of the previous year, and in the name of the Mexican nation, "the ownership in fee" of the tract to be vested in her, and that she might be put in peaceable possession thereof. The fourth condition attached to the grant stated the land to be seven square leagues in extent, as shown on an accompanying map, and directed the judicial officer who should give the grantee possession to cause it to be measured so as to point out its boundaries, the surplus to remain to the nation. In March, 1835, juridical possession of the land was given to her, after citation to the neighboring proprietors to be present at the proceeding; that is to say, the possession of the land was officially delivered to her under the direction of a magistrate of the vicinage. A copy of the record of this proceeding is before us, and it shows that all the formalities required by the laws of Mexico were fully complied with. The proceeding involved a measurement of the land, the marking of its boundaries, and the putting of the grantee in possession. To the record a map of the land was attached.

As stated above, the plaintiff deraigned his title through two patents of the United States, each being for an undivided half of the tract known as Las Bolsas. The first patent, bearing date on the 19th of June, 1874, was issued upon a final decree confirming the claim of Ramon Yorba and others, founded upon the grant of the Mexican government to Catarina Ruiz, issued, as mentioned above, on the twenty-second day of May, 1834. Their petition was presented to the land commission on the 20th of October, 1852. It traced the title of the claimants to Manuel Nieto, who, as averred, died in 1804 or 1805, "seised in fee, as owner" of the tract of land situated in the county of Los Angeles, "bounded by the river San Gabriel, by the old road to Santa Ana, by the river Santa Ana, and by the coast;" that Nieto acquired his title to the land by grant from Governor Pedro Fages some time between the years 1784 and 1785, which it was believed was subsequently ratified by the viceroy of New Spain; that four children survived him, who succeeded to his title and possession; and that after the death of two of them the land was divided by Governor Figueroa between the

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surviving sons and the widows of the deceased sons, and to them separate titles were issued for their respective portions; that to Catarina Ruiz the grant was issued for the tract called Las Bolsas, and under her the claimants derived their title. It seems from the language of the petition that the claimants treated the concession to Nieto as a grant of title, an instrument transferring the ownership of the lands to him. But, as already stated, the concession to him did not reach the title, and was only a permission to graze his cattle upon the tract mentioned. It may be doubted whether the political chief of the territory under the Spanish crown possessed any power to alienate the fee of any portion of the public domain. On this subject the land commission, which had occasion to examine the question when the title claimed under the concession to Manuel Nieto was before it, uses this language:—

“The concessions under the Spanish authority, made in the Californias before the independence of Mexico, do not purport to be perfect titles; at least, none of that character have fallen under the notice of the commission. One only has received confirmation, and that on the ground that an equitable, though not legal, title was established. The old grants were generally mere rights of possession or provisional, and in almost every case, when the government was established after the Mexican revolution, the parties applied for new grants, which they received, not as a mere evidence of a former subsisting title, but in the form, and under the terms, and subject to the conditions imposed by the law of 1824 and the regulations of 1828. Under these, the power of the governors over the public domain was defined. It was a power to grant under certain conditions, not a power to recognize and give new evidence of private titles already existing, without conditions or limitations. He had entire discretion as to choice of grantees, and this power enabled him to do most ample justice to persons who held under provisional grants previously issued, or who occupied without a shadow of title, or right to the possession. All these presented themselves to the new authorities for concessions under the new order of things, and readily received grants for the ancient possession. The archives of this commission are full of such docu-

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ments, and the custom was all but universal.” (Record in *United States v. Concepcion Nieto*, from land commission, in clerk’s office of United States district court, No. 423.)

Certain it is that Governor Figueroa, when he made the decree ordering grants to the heirs of Nieto, on the 27th of July, 1833, and when he signed the formal grants to them on the 22d of May, 1834, did not consider that the concession to Manuel Nieto passed the ownership of the land. Had it done so, he would have had no power to make grants of the land to others, and to subject his grants to possible forfeitures for breach of conditions annexed. His action shows conclusively that he regarded the land as still part of the public domain of Mexico, to be disposed of under its colonization laws.

The documentary evidence introduced before the land commission by the claimants, and upon which the decree of confirmation was made, consisted of the grant to Catarina Ruiz on the 22d of May, 1834, the record of the juridical possession given to her, and instruments transferring her title to them. The claim was confirmed September 22, 1854, to the extent of the undivided three fourths of the rancho. On appeal to the district court of the United States the decree was modified, and the confirmation limited to an undivided half of the rancho. Subsequently, on the 4th of March, 1858, the government waived its appeal from the decree of the district court, which thereupon became final. The boundaries given in the decree and recited in the patent are as follows:—

“The lands of which confirmation is hereby made are one undivided half of the tract called Las Bolsas, situated in the county of Los Angeles, said tract of Las Bolsas being a part of the lands originally granted to Manuel Nieto by Governor Pedro Fages, in or about the year 1784, and which said grant was recognized and confirmed by the decree of date July 27, 1833, made by Governor Jose Figueroa in the petition of Luciano Grijalva, presented on behalf of the heirs of the said Manuel Nieto, and by the grant of date May 22, 1834, issued by said Governor Figueroa to Catarina Ruiz, widow of Jose Antonio Nieto, a son of said Manuel Nieto, reference for the boundaries of tract of Las Bolsas being had to the said petition

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of Luciano Grijalva, and to the map accompanying the same, contained in the *expediente* filed in this case, to wit: On the south the sea, on the west the lands called Los Alamitos, on the north the lands called Los Coyotes and the tract solicited by Don Patricio Outiveras, and on the east the Rio de Santa Ana as the same ran at the date of said petition.”

The claim to the other undivided half of the rancho Las Bolsas was presented to the land commission by Maria Cleofa Nieto Murillo and her husband on the sixth day of November, 1852. It was rejected by the board because the claimants failed to connect themselves with the grant to Catarina Ruiz, but upon appeal to the district court this decree was reversed, and the undivided half of the land was confirmed to the claimants. The decree recites: “Reference for boundaries of said tract of the ‘Las Bolsas’ being had to the said petition of Luciano Grijalva and to the map accompanying the same, contained in the *expediente* filed in this case, to wit: On the south by the sea, on the west by the land called Los Coyotes and the tract solicited by Don Patricio Outiveras, and on the east by the river Santa Ana, as the same ran at the date of the petition.”

A survey of the land confirmed by the decree in favor Ramon Yorba was made in 1858, under the direction of the United States surveyor-general, and on the 16th of April, 1861, was ordered into the United States district court for review, under the act of June 14, 1860. Exceptions were filed to the survey, which affected the boundary on the west side, but did not affect the line along the east, along the river and its old bed, which is the line in dispute in this case. The exceptions to the western line were sustained, but no change was made on the eastern line, and in accordance with the direction of the district court, a modified survey of the land was made and returned into the court, which was finally approved February 6, 1874. Upon this approved survey, the patent to Yorba of the undivided half of the rancho was issued. The rancho under the confirmation to the Murillos was again surveyed under the direction of the surveyor-general of the United States for California in December, 1868, and was approved by him April 3, 1877, and

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by the commissioner of the general land office August 27, 1877, and upon it the patent to them was issued.

It is plain from this brief statement that on the 22d of May, 1834, the title passed from the Mexican government to Catarina Ruiz by the grant of Governor Figueroa, and by the juridical proceedings which followed in 1835, she was placed in possession of the premises granted. Her estate in the lands thus became perfect, subject only to the possibility of its becoming divested by the subsequent refusal of the departmental assembly to give its approval to the grant. The regulations of Mexico of 1828 for the colonization of the territories of the republic provided that grants of land by the governors thereof to families or private persons should not be held to be "definitively valid" without the previous approval of the departmental assembly, to which the documents relating to such grants were to be forwarded. But this provision did not prevent the title from passing by the grant of the governor. As said by the supreme court of the United States in *Hornsby v. United States*, 10 Wall. 238: "Such approval was not a condition precedent to the vesting of the title. According to the regulations of 1828, the authority to make grants of land in California was lodged solely with the governor. It was not shared by him with the assembly. That body only possessed the power to approve or disapprove of grants made by him. Until such approval the estate granted was subject to be defeated. With such approval the grant became, as it was termed in the regulations, 'definitively valid'; that is, it ceased to be defeasible, and the estate was no longer liable to be divested except by proceedings for breach of its other conditions. Besides, it was the duty of the governor, and not of the grantee, to submit to the assembly grants issued by him for their approbation. His neglect in this respect suspended the definitive validity, as it was termed, of the grant; that is, it prolonged the liability of the estate to be defeated by the action of the assembly and of the supreme government thereon, to which the matter was referred in case the approval of the assembly was not obtained; and no other consequence followed. His neglect was not permitted to operate to divest the grantees of the estate already vested in them. In many instances years elapsed before the

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approval was obtained, although the grantees were in the mean time in the possession and enjoyment of the property; and in many instances no approval was had previous to the conquest.”

No action was taken to divest the estate of the grantee under the former government, because her grant was not then approved, and the power of the departmental assembly, of course, ceased with the cession of the country. When, therefore, jurisdiction passed from Mexico to the United States, Catarina Ruiz was invested with full ownership of the land. She had an absolute title in fee to the entire tract described and measured off in the proceedings, giving her official possession of the property. Her interest in one undivided half of the premises having afterwards passed to Yorba and others, and in the other undivided half to the Murillos, and their claims having been presented to and confirmed by the board of land commissioners appointed by the United States to ascertain and settle private land claims in California, and their decrees of confirmation having become final by the dismissals of the appeals therefrom by the attorney-general, and the surveys of the lands confirmed having been approved, all controversy between those claimants and the United States respecting their title to those lands, and the extent and boundaries thereof, was closed. The decrees were conclusive as to the character of the title, not only against the United States, but also against all persons claiming under them by proceedings subsequent, and the patents of the United States issued thereon were a relinquishment of all claims or right in the lands or power over them, if any then existed. Only prior and superior rights of others remained unaffected. Unless, therefore, the defendants can show that by virtue of the concession made to the parties through whom they claim under the former government, or by virtue of the proceedings before the land commission and of the patents of the United States issued upon its decree, they acquired a right and title to the demanded premises prior and superior to that conferred by the grant of Figueroa to Ruiz on the twenty-second day of May, 1834, the plaintiff must be adjudged entitled to recover. What, then, was the right or title, if any, acquired by those defendants under the former government? To answer this question, we

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turn to the documents produced by them. The first of these is a petition of one Manuel Rodríguez, dated September 11, 1801, to Arrillaga, then governor of the territory, stating that in view of the repeated petitions through him to that officer, in behalf of Lieutenant Don Pablo Grijalva, for a place upon which to put his stock and build a house and corral, and in view of the power by the governor conferred upon him of passing upon the petitions, he had pointed out to Grijalva the place Arroyo de Santiago, lying midway between the missions San Juan Capistrano and San Gabriel, about nine leagues from each, stating that there was not within a great distance any rancheria of natives, and that neither of the missions claimed any right to it. The petitioner added that, should the governor make the concession desired, Grijalva might put upon the place a great number of cattle which he had in the immediate neighborhood of Manuel Nieto, and concluded with the expression of a hope that the governor would order a title to issue to Grijalva for the possession of the place within certain distances specified. To this petition the governor, on the 19th of October, 1801, replied, stating that Grijalva should apply to him (Rodríguez) for the place, setting forth its actual condition and the extent of land he desired, and that thereupon notice should be given to the adjoining proprietors to ascertain whether any damage would result to them by the concession asked; and that this being done (and no objection to the concession being made), he could issue a decree setting forth the fact that there was no objection, and order him to be placed in possession, he forwarding everything to the government for its approval and the issue of a title, adding that this was the way this kind of business was done for those to whom royal lands were given, though he did not know whether the government had made any new provision on this subject. Grijalva, accordingly, on the eighth day of December, 1801, made application to Rodríguez for the place Arroyo de Santiago, in order to put his cattle and horses thereon, stating that the place was situated eight leagues from the Mission San Juan Capistrano, and from nine to ten from the Mission of San Gabriel. He also stated the extent of the land he desired. On the 14th of December following Rod-

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riguez directed that notice of the application of Grijalva be given to the fathers of the missions San Juan Capistrano and San Gabriel, and to Manuel Nieto, in order to ascertain whether they would be prejudiced by granting his petition. The priest of the Mission of San Juan Capistrano returned that, so long as the applicant did not go beyond the boundaries of the land he asked, the concession would not prejudice the mission. It does not appear that any response was obtained from the priests of the Mission of San Gabriel, or that any grant was made upon the petition, or that any further action was had upon it.

It appears, however, that in 1809 one Antonio Yorba claimed that he had been a partner with Grijalva, and was interested with him in his application for the place upon which to put stock and build a house. In November of that year he accordingly presented, through his son, a petition to the governor of the territory referring to the petition of Grijalva, and stating that he had heard that Grijalva, who had since died, had not inserted his name in the application, notwithstanding their partnership; that, since Grijalva's death, he had agreed with one Juan Peralta to live upon the place, and, with one of the sons of the petitioner, take care of the cattle and horses that were upon it, being about three hundred head of each kind. In consideration of these facts, and the large family he had, he requested the governor to make a concession of the place of Santiago to him, that the neighbors of Peralta and himself might be profitable to both. This petition the governor forwarded to Lieutenant Don Francisco Maria Ruiz at San Diego, who, on the twentieth day of April, 1810, reported that the petition of Grijalva could not be found in the archives of the Presidio there, and that he had inquired for it without success of the widow of Grijalva; that she stated that she had heard her deceased husband say he had presented it in his own name; but, notwithstanding, it was her wish that Antonio Yorba, with his children, and her nephew, one Pablo Peralta, should remain on the rancho in order that they might take care of the stock and crops for the support of their families. On this report the governor made an order on the first day of July, 1810, in which he stated that there was no objection on his part to the concession solicited, upon the

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terms expressed by the petitioner, and for that purpose he directed that the commandant of the Presidio of San Diego should take the necessary steps to notify the adjoining land-owners to ascertain whether or not the concession would be detrimental to them, and, in case no detriment would result to them, that the petitioner should be placed in possession. No further proceedings appear to have been had upon this application. It is not shown that any notification to the adjoining proprietors was made, or that any information was obtained of their opinion whether such a concession would be detrimental to them or not. So far as the evidence before us discloses, the efforts of the petitioner ended with this report, and no further action upon it was taken by the governor of the territory. It is too plain for argument that no title passed from the governor by virtue of the documents produced. It is true the petitioner was subsequently in possession of the premises, but he does not produce, nor is there found, anywhere in the archives, any documents showing that any authority was given for him to occupy them. But even if the possession was taken by permission of the governor or other authorities, no inference of a grant of title can be drawn from it. Some formal proceedings were necessary under the Spanish government to pass title to any portion of the public domain out of the crown to the subject. The population at that time in the country was very sparse, and there were vast quantities of vacant land. Where one occupied such land for his cattle, very little complaint was likely to be made touching his authority. But be that as it may, nothing is shown by the documents conferring even an equitable right upon the petitioner, Yorba, or upon Peralta. It is plain, therefore, that neither of those parties, or any parties claiming through them, had any interest in the property in controversy under the former government, which would have given them a standing in a court of justice to call in question the right of Catarina Ruiz by her grant of May 22, 1834. Their interest was, at best, only such an equity as arises in favor of parties who had long been in the occupation of public land with the silent acquiescence of the government, from the possible improvement they may have made upon it. To such parties

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the government might well have extended a preference in the purchase or donation of the lands when it concluded to dispose of them. But mere possession of any portion of the public domain, under an instrument which did not purport to transfer the property, did not create under the Spanish law a title in the possessor which would enable him to hold the property against the crown; nor did such possession, however long continued, create any title against the Mexican government. (*Nieto v. Carpentier*, 21 Cal. 455, 489.) It follows that whatever title the heirs of Yorba and Peralta possessed in the lands in controversy, which passed to the defendants, was acquired by their proceedings before the board of land commissioners, and the patent of the United States issued upon its decree. The petition of the heirs to the board set forth that they claimed in fee-simple the tract of land known by the name of Santiago, containing about ten square leagues, by virtue of a concession to their ancestors by Arrillaga, governor of California, bearing date of July 1, 1810. The concession thus alleged was no other than the order of that date upon which we have already commented, and which did not, in itself, convey any interest in the lands solicited, and was not followed by any proceeding which purported to have that effect, even if it were clear that governors of the province under the Spanish crown possessed any authority to alienate portions of the public domain. The board of commissioners treated the document, however, as a grant of the land, or at least as creating, in connection with the possession of their ancestors, an equitable right to it, and accordingly, by its decree of July 10, 1855, confirmed their claim. An appeal to the district court of the United States was, on the eighth day of June, 1857, dismissed, the government suggesting that it did not intend to further prosecute it, and the decree of the board thus became final. The decree did not, however, change the character of the title of the claimants; it simply determined that it was valid and entitled to recognition and perfection by a survey and patent. When the latter was afterwards issued, on the twenty-first day of December, 1883, whatever title to the land was in the United States passed to the patentees; but if no title was then in them, none, of course, passed. That none

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was in them at that date is clear from what has already been said with respect to the title of the Las Bolsas claimed under the grant of Catarina Ruiz. The claim of Ramon Yorba and others to an undivided half of that rancho having been finally confirmed, the survey of that land having been made and approved, and a patent for such undivided half having been issued to the claimants on the nineteenth day of June, 1874, and the claim of the Murillos to the other undivided half also having been finally confirmed, and the same having also been approved, and a patent for that undivided half having been issued to the claimants on the twenty-seventh day of August, 1877, there was no interest or title in the premises surveyed and patented remaining in the United States which they could convey by any subsequent patent. However conclusive against the United States and parties claiming under them by title subsequent a patent may be, it in no respect impairs the right of a previous patentee to contest the title upon which the subsequent patent has been issued for the same premises. Every patent issued upon a confirmed claim under the act of March 3, 1851, in terms declares that it shall not affect the rights of third parties; that is, those who have a standing to contest the pretensions of the patentee, had no patent been issued.

It follows that the question as to the correctness of the survey of the Bolsas tract, approved by the United States district court and by the officers of the land department, which was much discussed by counsel, is of no practical consequence in the case. The patents under which the plaintiff claims, covering the premises in controversy, passed all the title which the United States then possessed therein, and, until those patents are set aside, the subsequent patent under which the defendants claim can pass no title which can be considered in this action. The issues in the case will therefore be found for the plaintiff, and judgment for the possession of the demanded premises entered thereon, with costs.

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IN RE CUDDY.

CIRCUIT COURT, SOUTHERN DISTRICT OF CALIFORNIA.

AUGUST 18, 1889.

1. **HABEAS CORPUS—APPEAL—DEFECTIVE RECORD—SECOND APPLICATION TO ANOTHER JUDGE.**—Where a petitioner for a writ of habeas corpus appeals to the supreme court of the United States from a judgment of the circuit court denying his application, having omitted voluntarily from the record a material portion of his case, he is not at liberty, after the judgment is affirmed, to renew his application before another court or justice of the United States, upon the same record, with the addition of the matter omitted, without obtaining leave for that purpose from the supreme court. The question would be different if subsequently occurring events had changed the situation of the petitioner so as to present a new case for consideration. How far a decision by one justice or court denying an application for a writ of habeas corpus can be deemed *res judicata*, upon the petitioner's right to the writ on another application before another justice or another court, considered.

Before FIELD, Circuit Justice.

This was an application by Thomas J. Cuddy, of Los Angeles, California, for a writ of habeas corpus, to be discharged from imprisonment.

Mr. J. A. Anderson, for petitioner.

Mr. George J. Denis, United States District Attorney.

FIELD, Circuit Justice. The petitioner applied to me some days ago in San Francisco for a writ of habeas corpus, alleging that he is unlawfully imprisoned by the marshal of the United States for the Southern District of California, and the warden of the jail of Los Angeles County, contrary to the constitution and laws of the United States; that such imprisonment is had under and by virtue of a warrant of commitment based upon a judgment of the district court of the United States for the Southern District of California, adjudging him guilty of contempt, and sentencing him to imprisonment in that jail for the period of six months. An order was thereupon made that a writ issue to be directed to the marshal and made returnable before me at this place, Los Angeles, on the 10th instant.

The petition sets forth the judgment of the district court, rendered on the 13th of February, 1889, upon which the writ

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of commitment was issued under which the petitioner is held. It is as follows:—

“Whereas, in the progress of the trial of the action of the *United States of America v. W. More Young*, on the twelfth day of February, 1889, upon the examination of the term-trial juror, Robert McGarvin, as to his qualification to sit as a trial juror in the said action, the said McGarvin testified, among other things, in effect, that on the day previous he was approached by one Thomas J. Cuddy, with the object on Cuddy’s part to influence his (McGarvin’s) action as a juror in the said case, in the event that he should be sworn to try the said action; and

“Whereas, from the testimony, this court, on the said twelfth day of February, 1889, entered an order directing the said Thomas J. Cuddy to show cause before this court, at the courtroom thereof, at ten o’clock, on the thirteenth day of February, 1889, why he should not be adjudged guilty of a contempt of this court; and

“Whereas, in response to the said citation, said Thomas J. Cuddy did, on the said thirteenth day of February, 1889, appear before the said court; and

“Whereas, testimony was then and there introduced in respect to the matter both for and against him.

“The court, having duly considered the testimony, does now find the fact to be that the said Thomas J. Cuddy did, upon the eleventh day of February, 1889, approach the said Robert McGarvin, at the time being a term juror duly impaneled in this court, with a view to improperly influence the said McGarvin’s action in the case of the *United States of America* against the said Young, in the event the said McGarvin should be sworn as a juror in said action.

“Now, it is here adjudged by the court that the said Thomas J. Cuddy did thereby commit a contempt of this court, for which contempt it is now here ordered and adjudged that the said Thomas J. Cuddy be imprisoned in the county jail of the county of Los Angeles for the period of six months from this date, and the marshal of this district will execute this judgment forthwith.”

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The petition sets forth the proceedings taken by the court, and alleges that the transaction which was the basis of the charge against the petitioner, and for which the judgment was rendered, took place on the eleventh day of February, 1889, when the district court was not in session, and nearly a quarter of a mile distant from the court-house in which that court is held. He therefore claims that the district court had no jurisdiction to try and sentence him for the alleged contempt, because the act charged as such was committed at the time and place designated, and was not adjudged to have been done corruptly or by threats or force. The purport of the objection is that the act charged as a contempt was not committed in the presence of the court, or so near thereto as to obstruct the administration of justice, and therefore did not present a case within the power of the court to punish summarily, under section 725 of the Revised Statutes, and therefore that the judgment was illegal and void. That section reads as follows:—

“The said courts (of the United States) shall have power to punish by fine or imprisonment, at the discretion of the court, contempts of their authority; *provided*, that such power to punish contempts shall not be construed to extend to any case except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness or other person, to any lawful writ, process, order, rule, decree, or command of said courts.”

The marshal returns the warrant of commitment under which he holds the prisoner. By consent of parties the record in the case of the petitioner before the circuit court and in the supreme court of the United States is also presented. By that record it appears that the petitioner, on the eleventh day of April, 1889, applied to the circuit court for the Southern District of California for a writ of habeas corpus, in order that he might be discharged from the imprisonment now complained of, asserting, as now, that the same was illegal, for the reason that the court had no jurisdiction to try and sentence him, because the matters set

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forth in the judgment do not constitute any contempt under section 725 of the Revised Statutes, and because the judgment was not founded upon proceedings in due course of law; that the circuit court, after due consideration, denied the application for a writ; that thereupon an appeal was taken from the judgment to the supreme court of the United States, where, after argument and due consideration, the judgment was affirmed. (131 U. S. 280.)

The additional matter set forth in the present application consists only of the testimony which was before the district court when the question of contempt charged against the petitioner was considered, and which might have been contained in the record of the supreme court, and if deemed important for the due consideration of the validity of the judgment of the district court, should have been thus presented. The finding and judgment of the district court do not state that the acts constituting the alleged contempt were done in the presence of the court, or so near thereto as to obstruct the administration of justice. The supreme court held that if done in the presence of the court, "that is, in the place set apart for the use of the court, its officers, jurors, and witnesses, they were clearly a contempt, punishable as provided in section 725 of the Revised Statutes, by fine or imprisonment, at the discretion of the court and without indictment;" but that inasmuch as the district court possesses superior jurisdiction within the meaning of the familiar rule that the judgment of such courts cannot be attacked collaterally, it must be presumed that it acted rightly upon such a state of facts as authorized its judgment; that the want of jurisdiction not appearing affirmatively, it must be presumed that the evidence made a case within its jurisdiction to punish the petitioner in the mode prescribed. The judgment of the district court was therefore affirmed.

The petitioner, in the present application, as appears from what has already been said, supplies what was omitted in his record to the supreme court. At the outset the question is thus presented, whether it is permissible for a party to appeal from a judgment denying his application, voluntarily omitting a material portion of his case, and after invoking the judgment of

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the appellate court upon the record presented, and failing therein to renew his application before another court or justice of the United States, without first having obtained leave for that purpose from the appellate court.

Before passing upon this question some consideration should be given to the position of the district attorney as to the jurisdiction of the court to punish summarily as a contempt, an act obstructing the administration of justice in pending cases, even if committed at a distance from the court-room. He contends, if I rightly understand him, that all the officers and parties necessarily attending, or summoned to attend, in pending cases in the courts of the United States, as marshals, clerks, jurors, and witnesses, "are so near thereto," that is, so connected therewith—applying the term, "so near thereto," as indicating relationship of subject rather than relationship of place—that misbehavior toward them, though they are distant at the time from the court-room, or during the temporary adjournment of the court, constitutes a contempt punishable under the statute. Certain it is that attempts to turn such officers or parties from the performance of their duty in order to secure the selection of particular persons as jurors, or to bias the judgment of the jurors selected, or to influence witnesses to suppress or qualify their testimony, or to absent themselves from the court, or threats of violence, or the use of insulting language to them respecting, or to influence their conduct, though uttered or done outside of the court-house, and at a distance from it, are as much an obstruction to the administration of justice as though uttered or done within its walls. Though I am not quite prepared to accept this position of the district attorney, it is entitled to grave consideration. I do not wish to express an opinion upon it, as it is unnecessary to the disposition of the case, and for the further reason that the justices of the supreme court deemed it of sufficient importance to reserve their judgment upon it.

The statute also declares the disobedience or resistance by any person of any "lawful writ, process, order, rule, decree, or command" of the courts of the United States to be a contempt. It is the practice of the district courts of the United States to

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command all persons summoned and sworn as term trial jurors to avoid speaking with others, and not to allow others to speak to them with respect to cases which may be tried before them. Such a command, if a standing rule of the court, or given as usual in its instruction to the jurors, when accepted, would bind all persons, jurors, parties, and others cognizant of it, and a disobedience of it would be a flagrant contempt. Nothing, indeed, can tend more to pollute the administration of justice, than to allow tampering with jurors. Any attempts, however slight, to swerve them from the strict line of their duty, should be punished with the utmost rigor. Purity in the administration of justice could not otherwise be maintained, and such purity is the only safety of the people under a free and popular government.

I suppose such a command was given by the district court in its instructions to the trial jurors of the term, to one of whom the improper approach was made which constitutes the contempt for which the petitioner was sentenced to be imprisoned; but as no record is preserved of it, I cannot act upon the suggestion of the fact.

I return, therefore, to the question whether the petitioner can renew his application for a writ after the decision of the supreme court on his appeal to that tribunal, without first having obtained its leave. If he can renew it on another record, which may also be in some other particular defective, and so on indefinitely whenever he fails on appeal, it is plain that the writ may often become an instrument of oppression instead of a means of relieving one from an unjust and illegal imprisonment.

The writ of habeas corpus, it is true, is the writ of freedom, and is so highly esteemed that by the common law of England applications can be made for its issue by one illegally restrained of his liberty to every justice of the kingdom having the right to grant such writs. No appeal or writ of error was allowed there from a judgment refusing a writ of habeas corpus, nor indeed could there have been any occasion for such an appeal or writ of error, as a renewed application could be made to every other justice of the realm. The doctrine of *res judicata* was not held applicable to a decision of one court or justice thereon; the entire judicial power of the country could thus be exhausted.

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(*Ex parte Kaine*, 3 Blatchf. 5, and cases there cited.) The same doctrine formerly prevailed in the several states of the Union, and in the absence of statutory provisions, is the doctrine prevailing now. In many instances great abuses have attended this privilege, which have led in some of the states to legislation on the subject. And in the absence of such legislation, while the doctrine of *res judicata* does not apply, it is held that the officers before whom the second application is made may take into consideration the fact that a previous application had been made to another officer and refused, and in some instances that fact may justify a refusal of the second. The action of the court or justice on the second application will naturally be affected to some degree by the character of the court or officer to whom the first application was made, and the fullness of the consideration given to it. I hardly think that an ordinary justice would feel like disregarding and setting aside the judgment of a magistrate like Chief Justice Marshall or Chief Justice Taney, who had refused an application for a writ after full consideration.

In some states an exception is also engrafted upon the general doctrine, where a writ is issued to determine as between husband and wife, which of the two shall have the custody of their children. In what I have said, I refer of course to cases where a second application is made upon the same facts presented, or which might have been presented on the first. The question is entirely different when subsequent occurring events have changed the situation of the petitioner so as in fact to present a new case for consideration.

In the present application there are no new facts which did not exist when the first was presented. And under the law of the United States, an appeal is allowed to the supreme court from the circuit court where the writ is refused, a provision which would seem to have been adopted to prevent a second application upon the same facts which were or might have been presented in the first instance. I am of the opinion that in such a case a second application should not be heard, except where the judgment of affirmance by the supreme court is rendered without prejudice to, or with leave to make a new application by the petitioner. He need not have appealed from the

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refusal of the circuit court; he could have applied to the circuit judge, and also afterwards to the circuit justice.* He did not think proper to pursue that course, but took his appeal to the supreme court, and during the argument there no suggestion was made that the record did not fully disclose the petitioner's case, and when that tribunal decided the case no request was made for permission to renew the application; and now the imprisonment of the petitioner under the judgment affirmed by that court is drawing to a close. It will expire this day. This writ must therefore be dismissed and the prisoner remanded; and it is so ordered.

IN THE MATTER OF THE APPLICATION OF RICHARD
CORCORAN, FOR HABEAS CORPUS.

CIRCUIT COURT, NORTHERN DISTRICT OF CALIFORNIA.

AUGUST 19, 1889.

1. PRISON—PENITENTIARY, MEANING OF. — The words "any prison or penitentiary," in the act of March 3, 1875 (1 Sup. Rev. Stats. 184), means state prison or penitentiary, and does not include county jails, or places employed for temporary confinement, or confinement for short periods for petty offenses.
2. ACT OF MARCH 3, 1875 (1 Sup. Rev. Stats. 184), construed.

Before SAWYER, Circuit Judge, and SABIN, District Judge.

By the Court, SAWYER, Circuit Judge. We are of opinion that the words "any prison or penitentiary," in the act of March 3, 1875 (1 Sup. Rev. Stats. 184), means state prison or penitentiary, and does not include county jails, or places employed for temporary confinement, or confinement for short periods for petty offenses. In some states the place of confinement, in punishment of the higher grade of offenses, is called a "state prison," and in others a "penitentiary," and Congress recognized this fact in providing for credits in this act.

The act supersedes the similar provision in sections 5543 and 5544, Revised Statutes, in which the words "jail or penitentiary" are used. This change in the language is significant,

* The circuit court which denied the writ was held by the district judge alone.

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and indicates an intention to limit credits to those state prisons and penitentiaries properly so called. This view renders it unnecessary for us to express our opinion upon the constitutionality of the state act allowing credits, a question which more properly belongs to the state supreme court to decide. Let the writ be denied.

THE CITY OF CARLISLE—WILLIAM BASQUALL, LIBELLANT.

DISTRICT COURT, DISTRICT OF OREGON.

AUGUST 20, 1889.

1. JURISDICTION IN ADMIRALTY.—The United States courts, as courts of admiralty, have jurisdiction of all cases of admiralty cognizance when the thing or parties are within the reach of their process, without reference to the nationality of either.
2. RIGHT OF INJURED SEAMAN.—It is the right of a seaman injured in the service of a vessel to be cared for, at least to the end of the voyage, and nothing short of gross negligence or wilful misconduct, causing or concurring to cause the injury, will forfeit such right.
3. IDEM.—A seamen injured in the service of a vessel has a lien on the same for the damages he may sustain by reason of the neglect or misconduct of the officers thereof in caring for him while affected by such injury.
4. EVIDENCE—COMPETENCY OF.—The admissibility or competency of evidence in a legal proceeding pertains to the remedy, and is governed by the *lex fori*, and therefore a clause in the British shipping act of 1854, making certain entries in the official log-book competent evidence in all courts, does not make them so in the courts of any other country.
5. JOINDER OF CAUSES OF SUIT.—The joinder of causes of suit not enumerated in admiralty rules 12 to 20 inclusive are not governed thereby, but by rule 46; and where the facts in a case establish a liability against the master and a lien on the ship for the same claim, such liability and lien may be enforced in one libel.
6. DAMAGES.—On the facts found: *Held*, that the master and vessel are liable to the libellant for damages for not caring for him after his injury as he was entitled to be, and for the aggravation of his injury and suffering caused thereby.

Before DEADY, District Judge.

Mr. Edward N. Deady, for libellant.

Mr. C. E. S. Wood, and *Mr. J. Ditchburn*, for defendant.

DEADY, J. William Basquall, a minor, by his guardian, Frederick V. Holman, brings this suit against the British bark City of Carlisle, and her master, C. D. Moore, to recover fifteen thousand dollars damages, for an injury sustained by him on board said bark, and neglect and maltreatment thereafter.

The charge in the libel is shortly this: In sending the main lower top-sail down on one occasion, the work was so carelessly and negligently done as to cause the starboard clew-iron thereof to strike the libellant on the head and fracture his skull; and thereafter the master failed to give or procure for the libellant such medical aid and assistance as the case required, and he “was able to give and render,” and maltreated and abused him.

The master admits, in his answer, that the libellant was injured as alleged, but avers that the injury was not caused by any negligence or carelessness in lowering said sail, but by the fault and carelessness of the libellant. He denies that he failed to give the libellant such medical aid and attention as the case required, and he was able to give or render, or that he maltreated him or abused him; and avers, in effect, that the libellant was well cared for after said hurt.

Some thirty-six witnesses were examined—twenty-two by the libellant and fourteen by the defendant. Among these were eleven of the officers and crew of the bark, and a number of experts who were called to testify whether or not the sail was lowered in a seaman-like manner.

The evidence from the vessel is, of course, more or less contradictory. Those of the crew who remain with the bark are called by the defendant, while those who have left her are called by the libellant.

The master, mate, second mate, steward, and two apprentices, who are in the last year of their service, testify for the vessel, while the cook, sail-maker, and two apprentices, including the libellant, and a stowaway boy, testify for the libellant.

In weighing this evidence, I am constrained to believe, that the master is not worthy of credit, and his testimony is of but little worth. The mate, George Dodd, impressed me favorably as a man. But he has been with his present employers, as man and boy, for a number of years, and may reasonably expect employment from them, in the near future, as a master. Under these circumstances, he is strongly tempted to make as good a case as he can for the vessel, which I think he has done, without going so far as to tell a downright falsehood. But he does not always remember, when I think he might.

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John A. Bebb is an apprentice in the service of the vessel's owners. He has only eight months more to serve, when, if he remains with the ship, he may be examined for a mate's certificate. I think he made up his mind that he could not testify against the ship, and go home in her with safety and comfort to himself. I am convinced that he gave altogether a different account of the matter to the libellant's attorney, when he may not have thought that he would be called as a witness, from that which he gave on the witness stand. It was indeed pitiful to see the confusion and shame on the poor fellow's face as he tried to deny or explain his former utterances.

Of the rest of the crew that remain with the bark, Harry Hart, the second mate, Thomas Noble, the steward, and George Eggert, an apprentice, nothing more need be said than this, that in giving their testimony they probably did not forget that the master had it in his power to make them very uncomfortable during the remainder of the voyage, which circumstance ought not to be overlooked in estimating the value of their evidence.

The libellant is largely interested in the result of the suit. Therefore his testimony ought to be received with caution, if not distrust. But he appears to be a simple, honest lad, and I seldom, if ever, heard one in his walk in life, or any other, testify with more apparent candor and artlessness than he did. The same may properly be said of the other three boys who testified for him, Henry Carley, the stowaway, William J. Freer, an apprentice, and Lawrence Ainsworth, an apprentice left in this port by a British vessel some months ago, and a former shipmate of the libellant in a training vessel at Liverpool.

Estimating the evidence in the light of these suggestions, I find the facts as follows:—

1. The libellant, a native of Dublin, whose parents reside at Stockport, Cheshire, having served two years and four months in the training ship *Indefatigable*, at Liverpool, was on September 22, 1888, at the age of sixteen years, with the consent of the officers of said ship, voluntarily apprenticed to Peter Iredell and Sons, of Liverpool, for the term of four years, to learn the business of a seaman, and thereupon he was duly shipped on the bark *City of Carlisle*, a vessel of 204 feet in length and 37

feet beam, then and now owned by said Iredell and Sons, to serve thereon as such apprentice on a voyage from Liverpool to Portland, Oregon, and thence elsewhere on the Pacific Coast, and back to a port of discharge in the United Kingdom.

2. On Monday, November 12, 1888, at eight o'clock A. M., in latitude 24.19 south, and longitude 37.15 west, and about 6 degrees or 332 geographic miles east of Rio Janeiro, it being the first mate's watch on deck, in which were the libellant and Carley, it was determined to change the lower main top-sail for a heavier one, as they were getting out of the tropics, whereupon the mate gave directions to prepare the sail to be lowered on deck, which was done by a seaman and the libellant and Carley, the latter two of whom cut the robands or ropes that fastened the head of the sail to the yard, and then returned to the deck before the sail was furled.

Under the direction of the mate, the sail was clewed up or the lower corners brought up to the yard at the bunt, or middle of the sail, by means of the clewlines, the buntlines or ropes used to pull up the sail were hauled, a gantline or rope used to lower the sail was rove through a block on the cross-trees and sent down and bent around the sail and hauled taut, then the sheets and clewlines were taken off, the earings loosed, the robands cut, and the head earings brought into the gantline and then made fast, and then the sail was lowered.

The clews, when hauled up, were not stopped or fastened together, and when the clewlines were detached from the clew-irons, the clews or lower corners of the sail fell down loose on either side of the gantline. At this time there was from a four to a six-knot breeze on the starboard quarter, and the yard was braced, so as to let the sail down on the port or lee side.

Before and at the time the sail was being furled and lowered the master was on the port side of the poop overlooking the sailmaker, who was preparing the sail to be sent aloft in the place of the one coming down. The libellant was standing on the starboard side of the vessel, just forward of the main hatch, and Carley was standing on the port side of the poop, assisting the sail-maker.

In lowering the sail the ship rolled, and the starboard clew

got foul of the mainstay, and the mate thinking it would clear itself—be pulled over the stay by the weight of the descending sail to the port side—allowed it to lower until he feared that if it did clear itself, the clew-iron would hit the deck and mar it, when he sang out “Hold on the gantline”—the rope with which the sail was being lowered—and sent the man then aloft down the mainstay to clear the clew. Before the man went down the stay the mate sang out “Stand clear,” and just before the clew was let go—past over to the port side of the stay—he said, “Look out there.”

As the clew was being cleared from the stay the master called to Carley to tell the libellant to come aft, where he wanted him to help the sail-maker. Carley went forward on the port side of the vessel, and told the libellant the master wanted him. The latter started aft immediately, going quickly across the main hatch in a diagonal direction, and as he reached the after corner of the same, on the port side, the clew of the sail dropped from the mainstay, and the clew-iron, an irregular shaped ring of four or five pounds weight, fastened to the corner of the sail, struck him on the right side of the head, about two thirds of the way from the ear to the crown, and fractured and depressed his skull, from the effect of which he fell senseless on the deck.

3. The mate and others who were present picked libellant up and carried him to the poop, where the steward, under direction of the master, washed the wound, cut the hair away around it, put some balsam on it, bandaged it, and moistened his lips with brandy, when he was taken forward and placed in his bunk in the house on deck, and Carley set to watch him that day, and during the nights following, for some three or four weeks. During the day the master took some stitches in the wound, and this is all the personal attention he ever gave the libellant while confined to the house, except to look in the room once a day or less, and turn up his nose at the smell, and go away.

In this condition the libellant was left in an unconscious or delirious state, sweltering and rolling in his own excrement, with no regular attendant but the boy Carley at night, and such casual attention and observation as he might receive from

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the members of the crew during the day, until Sunday, the eighteenth day of November, when the master, on repeated complaint of some of the crew, permitted, rather than directed, the mate and others to wash him and put some clean burlap under him. On the next day the mate restitched the wound, the first stitches having broken out, and thereafter he was washed at regular intervals, and his personal comfort in this respect reasonably cared for; but he was stinted in his food and water, and some of what he got was furnished or obtained for him by members of the crew.

4. In about six or seven weeks from the date of his injury the libellant was "turned to" by order of the master, and kept at work on deck from six in the morning to six in the evening, for the rest of the voyage; at first making paint swabs, sennit, and then cleaning brass, scraping deadeyes, washing and sweeping decks, hauling on the braces and handling sails, in short, all ordinary seaman's work except going aloft.

5. The wound on the libellant's head was still a running sore when he was set to work; at the same time he had a bad bed-sore on his buttock, another on his heel, and one on his ankle. On account of the latter two he could not wear his shoes, and in the tropics the hot deck burned his feet. From neglect, these bed-sores got proud flesh in them, and finally, at the suggestion of one of the crew, the libellant went to the master and asked him "to burn" them, which he did with caustic, repeatedly. In so doing he made the libellant let down his trousers while on the poop, and needlessly expose his private parts, at the same time making brutal and indecent remarks to him on the subject.

6. In consequence of the injury to his brain, the left side of the libellant, and particularly the arm and leg, were paralyzed, so as to seriously affect the use of them during the remainder of the voyage, in addition to which his eyesight was much impaired and his perception and memory materially weakened; notwithstanding which, the master required him to be on deck and at work as aforesaid, and often arbitrarily compelled him, to his great discomfort, to stand up, when the work at which he was employed admitted of his sitting down. He also

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habitually accosted him in a harsh, derisive, and contemptuous manner, calling him a "useless bugger," a "wastrel," and the like.

7. On March 13, 1889, the vessel arrived at Portland, when the libellant had leave to go ashore in the evening, where he met a boy, the witness, Ainsworth, whom he knew on the training ship at Liverpool, who took him to a boarding-house and saloon kept by the witness, Mrs. Pauline Rosenberg, where he stayed all night. In the morning Mrs. Rosenberg took him down to the vessel, and with the assent of the master, took him back to her house for the purpose of taking care of him. His condition appears to have aroused her sympathy, and she endeavored to raise means to send him home direct, but failed. She then consulted counsel in the case, with a view of making the vessel send him home, and the result was the boy was sent to the Good Samaritan Hospital, and thereafter, on March 29th, this suit was commenced.

8. The master failed and neglected to procure or provide any medical aid or advice for the boy after the arrival of the vessel in port, and was contriving and intending to get rid of him as easily as possible.

9. When the libellant went to the hospital his arm and leg were still partially paralyzed, and the attendant had to cut his food for him. At the trial he appeared to have improved mentally and was able to answer the questions put to him readily and intelligibly. The wound on his head had healed over. The scar is bare of hair and about three inches long and three fourths of an inch in width, and the depression in the skull is about three eighths of an inch. He had not recovered from the paralysis of his side, and according to the testimony of the medical expert, he may never do so, but probably will, on account of his youth. The doctor also thinks that the brain may accommodate itself to the depression in the skull, so that it will not be necessary or desirable to resort to the operation of trephining; but this is at least problematical.

10. The master did nothing toward sending the libellant home at the vessel's expense, and in my judgment never intended to, and the equivocal and invalid offer made at the trial to that

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effect was merely made *for effect*; and the proposition to send the boy home as a passenger on the City of Carlisle, with her present master, considering the duration of the voyage and the treatment he is likely to receive in the mean time, was simply inhuman.

11. The injury to the libellant was the result of the concurring carelessness of the vessel in lowering the sail without “stopping” the clews at the bunt thereof, and that of the libellant himself, in passing directly under the sail when, and as he did; but his carelessness was not of that gross character, nor was it the result of such reprehensible motives or purpose, as will forfeit his right to be kept and cured at the expense of the vessel; for he might not have perceived that the clew, when cast off the stay, would reach him, as it would not if he had been on the deck instead of the hatch, in crossing which, instead of going round in front of it, he was actuated by a laudable desire to obey the command of the master with alacrity, and get to the port side of the poop, where he understood he was wanted, by the shortest way and in the least possible time.

These are the material facts in the case. Before proceeding to state the law arising thereon, it may be well to briefly advert to the testimony in support of the last finding, for over this point the chief contention of the parties was made.

The *weight* of the expert testimony shows, that in sending down the topsail good seamanship requires that the clews when drawn up to the bunt of the sail should be “stopped” or tied together there. The danger of sending it down with the clews loose and the clew-irons dangling about is apparent to any one who has given any attention to the subject. The evidence also shows that in good weather, when a vessel is not rolling, the sail is often sent down with the clews loose. But in such cases, the vessel simply takes the chances. Then it may be said, “All’s well that ends well,” but otherwise not.

The libellant must have been aware of the fact that the sail was being lowered with the clews loose, and that the starboard one had swung over with the roll of the vessel and got foul of the stay. He had just come down from the yard where he had been assisting in cutting the robands to let the sail loose there-

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from. When called by the master he was standing on the deck just forward of the main hatch and probably looking at the man on the stay casting the clew loose. He must have heard the mate's warning, though neither he nor Freer who stood close beside him was questioned on that point.

It is also true that the mate testifies he gave the first warning two minutes before the clew was cast off, and the second one one minute before; from which it may be claimed that the warning was given so long before the event as to be no warning at all. But in the nature of things the warning, if given at all, would be nearer the event than this. And when the mate speaks of one or two minutes from recollection, at this distance of time, he merely intends to convey the idea that it was a very short time—only momentary.

Besides, I think it was the duty of the libellant, under the circumstances, to "look aloft" before he undertook to cross the hatch.

But as I have found, this carelessness of the libellant is not of such a character as to deprive him of his right to be cared for and cured by the vessel. The fault which will forfeit this right must be some positively vicious conduct, such as gross negligence or wilful disobedience of orders. (*The Chandas*, 6 Sawy. 549, and cases there cited; *The City of Alexandria*, 17 Fed. Rep. 390.) In this latter case Mr. Justice Brown says (p. 395): "The only recognized qualification of the seaman's right of recovery is where the injuries have arisen from his own gross and wilful misconduct." And in *Olsen v. Flavel*, 34 Fed. Rep. 479, this court said: "Where the negligence is concurrent, or both parties are in fault, courts of admiralty will apportion the damages, or give or withhold them, in the exercise of a sound discretion, according to principles of equity and justice, considering all the circumstances of the case;" citing *The Mariana Flora*, 11 Wheat. 54; *The Explorer*, 20 Fed. Rep. 135; *The Wanderer*, 20 Fed. Rep. 140; *The Max Morris*, 28 Fed. Rep. 881; *Atlee v. North Western U. Packet Co.* 21 Wall. 389.

There is nothing in the case to indicate that the libellant was either a negligent or wilful boy, but the contrary. He appears to have stood well in the training ship, where he held some

petty office, and had made such progress that he was allowed to become an apprentice and go to sea eight months before his period of training had expired. Nor do I think that the rule applicable to an experienced seaman as to skill and prudence in taking care of himself ought to be rigidly applied to a boy of sixteen years of age, a few weeks at sea, on his first voyage. He was only to receive twenty-eight pounds for four years' service, and was there to be taught and cared for, looked after in rather a paternal way.

The relation of master and apprentice is well recognized in the English law as imposing a peculiar responsibility on the master. Whether on land or water, he stands to the apprentice *in loco parentis*; so that the relation is not merely that of master and servant, or master and seaman. As Sir Henry Hobart said in the year 1616, in *Coventry v. Woodhall*, Hob. 134: "The matter of putting an apprentice is a matter of great trust *for his dyet, for his health, for his safety*. And generally no man can force an apprentice to go out of the kingdom, except it be so expressly agreed, or that the nature of the apprenticeship doth import it, as if he be bound an apprentice to a merchant-adventurer, or a *saylor*, or the like."

And although Basquall was not directly apprenticed to the master, he was to his owners, for whom he stood and whom he represented in all this matter.

On the question of going into Rio Janeiro for surgical aid for the libellant, I do not feel warranted on the state of the evidence as to the wind, in holding that it was the absolute duty of the master to make the deviation, though I am much inclined to think he might very properly have done so. He was 6 degrees east of Rio, and calling a degree of longitude at that point $55\frac{1}{2}$ geographic miles, he was about 232 miles from the port. The master says it was 600 miles. In this he is certainly mistaken, and probably intentionally so. He did not say whether he meant geographic or statute miles, but probably the former. However, the distance is less than 400 statute miles. With a six-knot breeze this distance might have been made in less than two and a half days, which does not seem a great delay or sacrifice to make in a voyage of five months, to save the life

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or mind of a boy committed to the care of the master *in loco parentis*. And later on, he might have gone into Montevideo or the Falkland Islands without going 100 miles out of his way. If the vessel was in need of a spar or topmast, I doubt not he would have gone into either of these ports to replace it.

As usual in these cases of suits against British vessels in this court, objection is made to the jurisdiction, because the parties and the vessel are British; and in this case, because the contract sued on (the articles of indenture) is not maritime.

And first, this suit is not brought on the articles of indenture, but on a tort committed on the high seas. The articles are mere matter of inducement, by which the relation of the libellant to the ship is shown—that of an apprentice to the owner—as the shipping articles would in the case of a similar suit by a seaman. Besides, the articles of indenture are just as much a maritime contract as the shipping articles. They are both contracts executed on land to be performed on sea. (*Marine Ins. Co. v. Dunham*, 11 Wall. 1; Ben. Ad. 261.)

Before taking this apprentice to sea the master was required by section 145 of the British M. S. act of 1854, to cause him to appear before the person before whom the crew was engaged, and there produce the indenture; and the name of the apprentice, with the date of the indenture, and the name of the port at which it was registered, was then entered on the “agreement” with the seaman. Thereupon he was duly shipped as an apprentice on the City of Carlisle for the voyage mentioned in the “agreement” or shipping articles, and has the same remedy against the master or vessel for any injury or wrong sustained by him during the voyage as any other member of the crew; and this in addition to any right of action he may have against Iredell and Sons directly on the covenants in the articles of indenture.

Courts of admiralty in the United States have jurisdiction of torts committed on the high seas without reference to the nationality of the vessel on which they are committed, or that of the parties to them. Such jurisdiction will, in the discretion of the court, be declined in suits between foreigners, where it appears that justice will be as well done by remitting the par-

ties to their home forum. But the jurisdiction will not be declined, where the suit is between foreigners, who are subjects of different governments, and therefore have no common forum. (*Bernhard v. Creene*, 3 Sawy. 230; *The Noddleburn*, 12 Sawy. 132; *The Belgenland*, 114 U. S. 355; Ben. Ad. sec. 282.)

There is no reason to decline the jurisdiction in this case. To do so would be equivalent to a denial of justice. The libellant is separated from the vessel. His condition and the circumstances justified him in leaving her; and it is highly probable that the master indirectly encouraged him to do so. The vessel is not expected to reach her home port for many months yet. And if he has a remedy on the covenants in the articles of indenture, directly against the owners in England, how is he going to get there in the mean time? and when there, where will his witnesses be? The crew have all left the vessel, except the officers and two apprentices, and no one can say where they will be in that time. Indeed, it is shocking to think of turning this poor, helpless boy out of court in a civilized country without redress for a grievous wrong, upon the theory that he has a remedy in the courts of his own country, when it is apparent that however just may be the laws of such country and impartial their administration, such remedy is, under the circumstances, to him utterly unavailable.

As Mr. Benedict, in discussing this question, well says (Ben. Ad. sec. 282): "Nothing within the territory of a nation is without its jurisdiction. . . . All persons in time of peace have the right to resort to the tribunals of the nation where they may happen to be for the protection of their rights. The jurisdiction of the courts over them is complete, except when it is excluded by treaty."

The official log-book was offered in evidence for the defense, on the question of the injury to the libellant and his subsequent treatment. On objection made by the libellant, it was admitted subject thereto.

The British M. S. act of 1854 provides (sec. 282) that an entry shall be made by the master in the official log-book in "every case of illness or injury to any member of the crew, with the nature thereof, and the medical treatment adopted, if any;"

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and section 285 of the same declares: "All entries made in any official log-book as hereinbefore directed shall be received in evidence in any proceeding in any court of justice, subject to all just exceptions."

But this act does not settle the question for this court. So far as it declares the admissibility of the log-book as evidence, it is only in force in British courts. By the law of this court, the *lex fori*, the competency of evidence in a proceeding before it, must be determined, and not that of Great Britain. (Whart. Con. Laws, sec. 752.) However, I think the book is admissible under our law, as *prima facie* evidence of the truth of the entries required by the British act to be made therein. (1 Greenleaf on Evidence, sec. 495; 1 Wharton on Evidence, sec. 648.)

But the entries in the log are shown to be materially untrue, and could not well have been made contemporaneous with the events to which they relate. Under no circumstances could they have any more weight, as evidence, than the master's statement on oath, as a witness, which I am constrained to consider unworthy of credit.

It is also objected that the suit "joins a libel *in personam* with a libel *in rem*." This objection comes too late on the argument. It ought to have been made, if at all, by exception to the libel before answer. And if it were well taken now, and it had any merit, the court would allow the libellant to dismiss as to the master.

I had occasion to examine this subject in the case of *The Director*, 11 Sawy. 493, and the conclusion there reached was that the admiralty rules from 12 to 20 inclusive, relating to joinder of parties or causes of suit in certain cases, do not apply to cases not therein enumerated; and that such cases may be proceeded in in this respect, under rule 46, in such manner as the court may deem expedient for the administration of justice; and also that where the facts of the case establish the liability of the master and give the libellant a lien on the vessel as well, for the amount of his claim, it is proper and expedient that the proceeding against him and the vessel be joined in one libel.

This case is not within any of the admiralty rules aforesaid regulating the joinder of causes of suit, and therefore comes under rule 46. The claim of the libellant, if established, is certainly a lien on the vessel; and a suit to enforce it may include a cause of suit against the master, arising out of the same facts. (*The Clatsop Chief*, 7 Sawy. 274; Ben. Ad. secs. 396, 397.)

This I believe disposes of the case, except the question of damages.

Assuming, as I do, that it was the duty of the vessel to take care of the libellant, at least to the end of the voyage, including such medical treatment as was proper, and could reasonably have been obtained, as decided in *The City of Alexandria*, *supra*, in *Reed v. Canfield*, 1 Sum. 195, and *The Atlantic*, Abb. Adm. 451, the damages under this head will be confined to what is necessary to make good, as far as possible, the default of the vessel in this respect.

When the City of Carlisle arrived at Portland, the master should have sent the libellant at once to a hospital, and had him examined by some skillful and well-known physician. This would probably have resulted in trephining him, when he might have been able to continue on the voyage, but most likely not; in which case he should have been sent home direct, as soon as he was able to travel.

Measured by this rule I estimate and assess these damages as follows: Hospital expenses for five months at one dollar per day, one hundred and fifty dollars; expense of trephining, one hundred and fifty dollars; expense of journey to Liverpool, two hundred dollars—in all five hundred dollars. This includes nothing for pain, suffering, or inconvenience resulting from the injury, whether temporary or permanent. He is entitled to wages until his return home or the end of the voyage, which will be about a year. This is six pounds or thirty dollars.

In addition to this, the libellant must have damages for the gross neglect and mistreatment he received after the injury, whereby his injury and suffering were much aggravated.

In *The Alexandria*, 17 Fed. Rep. 395, Mr. Justice Brown, after stating that the ship was bound for the care of an injured sea-

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man and wages to the end of the voyage, unless the injury arose "from his own gross and wilful misconduct," says: "Misconduct or neglect by the officers in the treatment of the seaman, after he has been wounded in the service of the ship, becomes a different and additional cause of action against the ship, because a legal obligation to him then arises to afford suitable care and nursing; and if this be neglected, the ship may be held to consequential damages."

On the ground of gross neglect and cruel maltreatment of the libellant since his injury, I estimate and assess the damages of the libellant at one thousand dollars.

It may be said that this result is a hardship on the owners, who will probably have to satisfy the decree. That may be so, but Basquall's is much the harder lot of the two. And if owners do not wish to be mulct in damages for such misconduct, they should be careful to select men worthy to command their vessels and fit to be trusted with the safety and welfare of their crews, and particularly apprentice boys, during the long and perilous voyage from the North Atlantic to the North Pacific.

A decree will be entered in favor of the libellant for one thousand five hundred and thirty dollars and the costs of the suit.

IN THE MATTER OF THE APPLICATION OF STEPHEN J.
FIELD FOR HIS DISCHARGE UPON WRIT OF HABEAS
CORPUS.

CIRCUIT COURT, NORTHERN DISTRICT OF CALIFORNIA.

AUGUST 24, 1889.

1. HABEAS CORPUS—CONSPIRACY—JUSTICE OF UNITED STATES SUPREME COURT UNDER ARREST—WHEN ENTITLED TO BE DISCHARGED.—Where a judicial officer of the United States is held in custody upon a warrant issued by a justice of the peace of a state, charging him with a felony, the sworn allegation of the officer in his petition, that he believes that the issue of said warrant and his detention thereunder are in execution of a conspiracy to prevent him by force and intimidation from discharging the duties of his office thereafter, and to injure him in his person on account of the lawful discharge of his duties previously, by removing him to a place where he can be subjected to indignities and humiliation, and where the conspirators may compass his death, is sufficient to authorize the issue of a writ of habeas corpus by a court of the United States, to inquire into the legality of such warrant and the detention of the petitioner.

XIV. SAWY.—13.

Before SAWYER, Circuit Judge.

The facts which led to the issue of a warrant by a state magistrate, and of the writ of habeas corpus upon the application of the petitioner, will be found stated in the petition, but more fully in the *Terry Contempt Case*, reported in 13 Sawy. 440, 454. The following is the petition somewhat abbreviated from the original, which in the haste in which it was prepared by counsel, contained some repetitions:—

To the Hon. Lorenzo Sawyer, Judge of the Circuit Court of the United States in and for the Northern District of California. Ninth Circuit.

The petition of Stephen J. Field respectfully shows to your honor that at all the times mentioned in this petition he was, and now is, a duly appointed, qualified, and acting associate justice of the supreme court of the United States, and as such allotted to the ninth circuit by an order duly made and entered by the supreme court of the United States.

Your petitioner further respectfully shows that he is unlawfully imprisoned, detained, and confined and restrained of his liberty by one Thomas Cunningham, sheriff of the county of San Joaquin, state of California, at the city and county of San Francisco, in the state of California; that the said imprisonment, detention, confinement, and restraint are illegal, and that the illegality thereof consists in this, to wit:—

That the only pretext or cause of such arrest or detention is by virtue of a warrant of arrest issued by a justice of the peace of the county of San Joaquin, state of California, a copy of which said warrant is hereunto annexed, marked "Exhibit A," and made a part hereof, which said warrant was issued by said justice upon a complaint made by one Sarah Althea Terry, charging your petitioner with the crime of the murder of one David S. Terry, at the said county of San Joaquin, state of California, on the fourteenth day of August, 1889.

That in the pursuance of the discharge of the duties devolving upon your petitioner under the laws of the United States as associate justice of the supreme court of the United States, your petitioner had been to the city of Los Angeles, state of

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California, to hold a circuit court of the United States of the ninth circuit, in and for the Southern District of California, and had on the twelfth and thirteenth days of August, 1889, held said court at said place; and in pursuance of his duties as said associate justice, in and for the same circuit, in the Northern District of California, your petitioner, on the said thirteenth day of August, 1889, left the said city of Los Angeles, state aforesaid, for the city of San Francisco, and in the discharge of the duties devolving upon him under the laws of the United States, was on the fourteenth day of August, 1889, en route by railroad from said city of Los Angeles to the city of San Francisco, state aforesaid, for the purpose of holding a session of the circuit court at the said last-named city on the fifteenth day of August, 1889.

While so en route, in pursuance of the discharge of his duties under the laws of the United States, as associate justice of the supreme court of the United States, and on the morning of the 14th of August, 1889, while your petitioner was seated at the breakfast table engaged in taking his breakfast at the station known as Lathrop, on the line of the Southern Pacific Railroad Company, and in the county of San Joaquin, state of California, your petitioner was maliciously and wickedly assaulted from behind, without any forewarning, by David S. Terry, which said assault was not provoked by any act, word, or deed done or said by your petitioner, and that said assault was made under the following antecedent state of facts:—

That your petitioner, as associate justice of the supreme court of the United States, in the discharge of the duties devolving upon him under the laws of the United States, on the third day of September, 1888, was holding a regular session of the circuit court of the United States of the ninth circuit, in and for the Northern District of California, and your petitioner, while so in the discharge of the duties devolving upon him as aforesaid, under the laws of the United States, was delivering an opinion of said court in the cases of *Sharon v. Hill* and *Newlands et al. v. Terry et al.*, then pending in said court, the said David S. Terry and Sarah Althea Terry, his wife, each committed a contempt of said court, and of said contempts was

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then and there adjudged guilty by said court and sentenced to imprisonment in the county jail of Alameda; he for the term of six months and she for the term of thirty days. That at the time of the commission of said contempt by the said Terry and his wife, and their arrests, convictions, and sentences therefor, and at divers sundry times and places since said convictions and sentences for said contempt, your petitioner is informed and believes, and upon such information and belief alleges that the said Terry and his said wife have respectively threatened that at the first opportunity they would insult, assault, and kill your petitioner for and on account of the aforesaid acts done in the discharge of the duties devolving upon your petitioner as associate justice of the said supreme court of the United States, while holding said court as aforesaid; and said David S. Terry repeatedly and frequently threatened and declared that he would get even with your petitioner, and that he intended to meet your petitioner upon his next return to California, when he would get even with him by insulting, assaulting, and killing your petitioner.

That on account of the frequent and repeated threats so made as aforesaid by the said David S. Terry and wife, the United States marshal for the Northern District of California, as your petitioner is informed and believes, was instructed by the attorney-general of the United States to use all due and necessary precautions for the purpose of protecting your petitioner from assaults, injury, or violence at the hands of said David S. Terry, or any other person at his instigation or under his control. And said United States marshal, pursuant to said instructions, had directed one David Neagle, then and there a deputy United States marshal, to accompany your petitioner while en route from the city of Los Angeles to the city of San Francisco, state of California, and said David Neagle, deputy United States marshal as aforesaid, was in company with your petitioner on the fourteenth day of August, 1889, while en route from said city of Los Angeles to said city of San Francisco for the purposes hereinbefore stated, and in company with your petitioner in the dining-room at Lathrop, the station aforesaid, on the occasion of the assault aforesaid, made upon your

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petitioner by said David S. Terry, and in pursuance of the instructions given by the United States marshal aforesaid, to protect your petitioner from any injury or violence at the hands of said David S. Terry, should any injury be attempted. When said assault was made as aforesaid upon your petitioner by the said David S. Terry, then and there, in pursuance of the instructions theretofore given him, the said David Neagle, deputy marshal aforesaid, did defend and protect your petitioner against the assaults then and there made in and upon your petitioner by the said David S. Terry, as aforesaid, and that in doing so it resulted in the death of said David S. Terry.

That your petitioner in no way or manner defended or protected himself, nor gave utterance to any declarations nor directions to said David Neagle, deputy United States marshal aforesaid, or to any other person, and was merely present at the place aforesaid, going from the city of Los Angeles as aforesaid to the city of San Francisco in the discharge of his official duties as associate justice of the supreme court of the United States, to hold court at the city of San Francisco, ninth circuit, in and for the Northern District of California, as aforesaid, and your petitioner was not then, nor has he been at any time for many years, armed with any weapon whatever, nor has he used any weapon whatever.

That under the circumstances detailed the said Sarah Althea Terry, as your petitioner is informed and believes, and upon such information and belief alleges, falsely and maliciously swore out the warrant of arrest hereinbefore set out against your petitioner, without any further basis for the charge of murder than the facts hereinbefore detailed, and that the warrant aforesaid was issued by such justice of the peace without any just or probable cause therefor.

And your petitioner therefore states that he is advised by counsel, John T. Carey, Esq., United States district attorney for the Northern District of California, residing at San Francisco, Cal., and so believes, that his said imprisonment is illegal, and is in violation of the constitution and the laws of the United States, and without legal authority.

And your petitioner further avers that he, with the Hon.

LORENZO SAWYER, United States circuit judge, is now engaged in holding a session of the United States circuit court, ninth circuit, in and for the Northern District of California, and in discharging the duties of his said office of associate justice of the supreme court of the United States, and will be so engaged for some time to come, and that said illegal detention and imprisonment does and will interfere with and prevent your petitioner from discharging his duties as such associate justice, in violation of the constitution and laws of the United States.

And your petitioner further represents that the charge against him and the warrant of arrest issued and in the hands of the said sheriff are founded upon the sole affidavit of Mrs. Sarah Althea Terry, who was not present, and did not see the shooting which caused the death of said David S. Terry.

That in a suit brought by William Sharon, now deceased, against her, before her marriage to the said Terry, it was proved and held by the circuit court of the United States that she had committed the forgery of the document produced in the case, and had attempted to support it by perjury and subornation of perjury, and had also been guilty of acts and conduct showing herself to be an abandoned woman, without veracity; . . . that the abandoned character of the said Sarah Althea Terry, and the fact that she was found guilty of perjury and forgery and the subornation of perjury in the case above mentioned by the said circuit court, and the fact of the revengeful malice entertained toward your petitioner by said Sarah Althea Terry, are notorious in the state of California and are notorious in the city of Stockton, and as your petitioner believes, were well known to the district attorney of the said county of San Joaquin, and also to the said justice of the peace who issued the said warrant. And your petitioner further alleges that had either of said officers taken any pains whatever to ascertain the truth in the case, they would have ascertained and known that there was not the slightest pretext or foundation for any such charge as was made, and also that the affidavit of Sarah Althea Terry was not entitled to the slightest consideration whatever.

Your petitioner therefore states that it is to him incompre-

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hensible how any man, acting in a consideration of duty, could have listened one moment to charges from such a source, and without having sought some confirmation from disinterested witnesses; and your petitioner believes and charge that the whole object of the proceeding is to subject your petitioner to the humiliation of arrest and confinement at Stockton, where the said Sarah Althea Terry may be able by the aid of partisans of hers to carry out her long-continued and repeated threats of personal violence upon your petitioner, and to prevent your petitioner from discharging the duties of his office in cases pending against her at the federal court at San Francisco.

Wherefore, to be relieved of said unlawful detention and imprisonment your petitioner prays that a writ of habeas corpus, to be directed to the said Thomas Cunningham, sheriff of the county of San Joaquin, state of California, may issue in this behalf, so that your petitioner may be forthwith brought before this court, to do, submit to, and receive what the law may require, and to that end that the court order that should the said Thomas Cunningham, sheriff aforesaid, refuse to obey the commands of this writ issued herein, then that the United States marshal for the Northern District of California take your petitioner thus held in custody and forthwith bring your petitioner before this court, to be dealt with according to law.

STEPHEN J. FIELD.

STATE OF CALIFORNIA,
CITY AND COUNTY OF SAN FRANCISCO. } ss.

Stephen J. Field, being first duly sworn, deposes and says: That he is the petitioner named in the foregoing petition subscribed by him; that he has read the same and knows the contents thereof, and that the statements therein made are true to the best of his knowledge, information, and belief.

Subscribed and sworn to and before me this sixteenth day of August, 1889.

L. S. B. SAWYER,

Commissioner United States Circuit Court, Northern District of California.

Copy of the warrant referred to in the petition:—

"In the Justice's Court of Stockton Township.

"STATE OF CALIFORNIA, }
COUNTY OF SAN JOAQUIN. } ss.

"The People of the State of California to any sheriff, constable, marshal, or policeman of said state or of the county of San Joaquin:—

"Information on oath having been this day laid before me by Sarah A. Terry that the crime of murder, a felony, has been committed within said county of San Joaquin on the fourteenth day of August, A. D. 1889, in this, that one David S. Terry, a human being, then and there being, was wilfully, unlawfully, feloniously, and with malice aforethought shot, killed, and murdered, and accusing Stephen J. Field and David Neagle thereof: You are therefore commanded forthwith to arrest the above-named Stephen J. Field and David Neagle and bring them before me, at my office, in the city of Stockton, or, in case of my absence or inability to act, before the nearest and most accessible magistrate in the county.

"Dated at Stockton this fourteenth day of August, A. D. 1889.

H. V. J. SWAIN,

"Justice of the Peace."

Copy of the complaint referred to in the warrant:—

"In the Justice's Court of Stockton Township, in the county of San Joaquin, state of California.

"THE PEOPLE OF THE
STATE OF CALIFORNIA
against
STEPHEN J. FIELD AND
DAVID NEAGLE, DEFEND-
ANTS.

Before H. J. V. SWAIN, ESQ.,
Justice of the Peace.

"Personally appeared before me this day, Sarah A. Terry, and says that at and in the county of San Joaquin, state of California, on or about the fourteenth day of August, A. D. 1889, one Stephen J. Field and David Neagle committed the crime of murder, a felony, in this, that the said Stephen J. Field and David Neagle did, at and in the county and state aforesaid, wilfully, unlawfully, feloniously, and of their malice afore-

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thought, shoot, and kill, and murder one David S. Terry, a human being, then and there being. And all of which is contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the people of the state of California.

"Said complainant therefore prays that a warrant may be issued for the arrest of said Stephen J. Field and David Neagle, and that they may be dealt with according to law.

"SARAH A. TERRY.

"Subscribed and sworn before me this fourteenth day of August, A. D. 1889.

"H. V. J. SWAIN,

"Justice of the Peace in and for said County."

A writ of habeas corpus was immediately issued by the circuit judge, returnable before the circuit court, commanding the sheriff of San Joaquin County to have the body of the petitioner before the court forthwith. The writ was at once served, and the sheriff accompanied by the petitioner proceeded to the room of the circuit court. There the sheriff was advised by his counsel, and upon their advice made the following return to the writ:—

"COUNTY OF SAN JOAQUIN, STATE OF CALIFORNIA,

"SHERIFF'S OFFICE. ;

"*To the Honorable Circuit Court of the United States for the Northern District of California.*

"I hereby certify and return that before the coming to me of the hereto-annexed writ of habeas corpus, the said Stephen J. Field was committed to my custody, and is detained by me by virtue of a warrant issued out of the justice's court of Stockton Township, state of California, county of San Joaquin, and by the indorsement. Copy of said warrant and indorsement is annexed hereto and made a part of this return. Nevertheless, I have the body of the said Stephen J. Field before the honorable court, as I am in the said writ commanded.

"August 16, 1889.

THOS. CUNNINGHAM,

"Sheriff San Joaquin County, California."

To give the petitioner time to traverse the return of the sheriff, if he thought it expedient to do so, and to give him, and also

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the state, time to produce witnesses, the further hearing upon the return was adjourned over until the 22d of August. Upon this occasion the district attorney of the United States for the district of California appeared for the petitioner under the directions of the attorney-general of the United States, and he moved that pending the proceedings upon this writ the petitioner be discharged upon his own recognizance of five thousand dollars, which was ordered. Mr. Wilson, Mr. Mesick, and Mr. Herrin also appeared for the petitioner.

On the 22d of August the petitioner filed the following traverse to the return:—

In the Circuit Court of the United States, of the Ninth Circuit, in and for the Northern District of California.

In the matter of Stephen J. Field upon habeas corpus.

The petitioner, Stephen J. Field, traverses the return of the sheriff of the county of San Joaquin, state of California, made by him to the writ of habeas corpus, issued by the circuit judge of the ninth circuit, and made returnable before the circuit court of said circuit, and avers:—

That he is a justice of the supreme court of the United States, allotted to the ninth judicial circuit, and is now and has been for several weeks in California in attendance upon the circuit court of said circuit, in the discharge of his judicial duties; and further, that the said warrant of the justice of the peace, H. V. J. Swain of Stockton, California, issued on the fourteenth day of August, 1889, under which the petitioner is held, was issued by said justice of the peace without reasonable or probable cause, upon the sole affidavit of one Sarah Althea Terry, who did not see the commission of the act which she charges to have been a murder, and who is herself a woman of abandoned character and utterly unworthy of belief respecting any matter whatever; and further, that the said warrant was issued in the execution of a conspiracy, as your petitioner is informed, believes, and charges, between the said Sarah Althea Terry and the said justice of the peace, H. V. J. Swain, and one Avery C. White, district attorney of said county of San Joaquin, and one E. L. Colnon of said Stockton, to prevent by force and intimidation your peti-

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tioner from discharging the duties of his office hereafter, and to injure him in his person on account of the lawful discharge of his duties of his office heretofore, by taking him to Stockton, where he could be subjected to indignities, humiliation, and where they might compass his death.

That the said conspiracy is a crime against the United States under the laws thereof, and was to be executed by an abuse of the process of the state court, two of said conspirators being officers of the said county of San Joaquin, one the district attorney, and the other a justice of the peace, the one to direct, and the other to issue the warrant upon which your petitioner could be arrested.

And the petitioner further avers that the issue of said writ of habeas corpus, and the discharge of your petitioner thereunder, were and are essential to defeat the execution of said conspiracy.

And your petitioner further avers that the accusation of crime against him upon which said warrant was issued is a malicious and malignant falsehood, for which there is not even a pretext; that he neither advised nor had any knowledge of any intention of any one to commit the act which resulted in the death of David S. Terry; and that he has not carried or used any arm or weapon of any kind for over thirty years.

All of which your petitioner is ready to establish by full and competent proof.

Wherefore your petitioner prays that he may be discharged from said arrest and set at liberty. STEPHEN J. FIELD.

STATE OF CALIFORNIA, }
CITY AND COUNTY OF SAN FRANCISCO. } 88.

Stephen J. Field, being first duly sworn, deposes and says, that he is the petitioner in this proceeding, and named in the foregoing traverse subscribed by him; that he has read the same and knows the contents thereof, and that the statements therein made are true to the best of his knowledge, information, and belief.

Subscribed and sworn to before me this twenty-second day of August, 1882.

STEPHEN J. FIELD.

L. S. B. SAWYER,

Commissioner of U. S. Circuit Court.

The law of conspiracy referred to in the above traverse is found in section 5518 of the Revised Statutes, which is as follows:—

“If two or more persons in any state or territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof, or to induce by like means any officer of the United States to leave any state, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties, each of such persons shall be punished by a fine of not less than five hundred nor more than five thousand dollars, or by imprisonment, with or without hard labor, not less than six months nor more than six years, or by both such fine and imprisonment.”

To this traverse the sheriff, acting under the direction of his counsel, interposed the following demurrer:—

“In the United States Circuit Court for the Northern District of California—Hon. Lorenzo Sawyer, Judge.

“In the matter of Stephen J. Field on habeas corpus.

“Now comes Thomas Cunningham, sheriff of the county of San Joaquin, state of California, and demurs and excepts to the sufficiency of the traverse made by the petitioner to his return herein, on the following grounds:—

“That said traverse does not contain or set forth facts sufficient to give this court jurisdiction to discharge said petitioner from arrest on the writ of habeas corpus issued herein, or to authorize this court to grant the relief, or any of the relief prayed for by said petitioner.

“That it appears by the return herein that said Stephen J. Field is held by said Thomas Cunningham as sheriff of the county of San Joaquin, state of California, under warrant and commitment duly made and issued pursuant to and in conformity to the laws of the state of California, by a court of competent jurisdiction of said state of California, upon a com-

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plaint charging said Stephen J. Field with the crime of murder; and it does not appear by said traverse that said Stephen J. Field is in custody for any act done or committed in pursuance of any law of the United States, or of any order or process or decree of any court or judge thereof; and it does not appear that said Stephen J. Field is in custody in violation of the constitution or any law or treaty of the United States.

, "Wherefore the respondent prays that the writ of habeas corpus heretofore issued by this honorable court herein be discharged, and that the said Stephen J. Field be remanded to the custody of this respondent, to be dealt with according to the laws of the state of California.

"AVERY C. WHITE,

"District Attorney of the County of San Joaquin,
State of California, Attorney for the Respondent.

"JAMES G. MAGUIRE,

"W. E. TURNER, of counsel."

Thereupon the case was submitted, with leave to counsel to file briefs any time before the 27th of August, to which time the further hearing was adjourned.

The following brief was afterwards presented on behalf of the petitioner:—

By the demurrer of the sheriff of San Joaquin to the traverse of his return to the writ of habeas corpus, made by Mr. Justice Field, the following facts are admitted:—

1. That the warrant of arrest under which the petitioner is held was issued without reasonable or probable cause.

2. That it was issued upon the sole affidavit of one Sarah Althea Terry, who did not see the commission of the act which she charges to have been a murder, and who is herself a woman of abandoned character and utterly unworthy of belief respecting any matter whatever.

3. That the said warrant was issued in the execution of a conspiracy between said Sarah Althea Terry and the said justice of the peace, and one Avery C. White, district attorney, and one E. L. Colnon, to prevent by force and intimidation the petitioner from discharging the duties of his office hereafter, and to injure him in his person, on account of the lawful dis-

charge of the duties of his office heretofore, by taking him to Stockton, where he could be subjected to the indignities and humiliation, and where they might compass his death.

4. That the said conspiracy is a crime against the United States under the laws thereof, and was to be executed by an abuse of the process of the state court, two of said conspirators being officers of said county of San Joaquin, one the district attorney, and the other a justice of the peace, the one to direct, and the other to issue the warrant upon which your petitioner could be arrested.

5. That the issue of the writ of habeas corpus and the discharge of the petitioner were and are essential to defeat the execution of the conspiracy.

6. That the accusation of crime against the petitioner upon which the warrant was issued is a malicious and malignant falsehood, for which there is not even a pretext.

7. That the petitioner never advised nor had any knowledge of the intention of any one to commit the act which resulted in the death of David S. Terry, and that he has not carried or used any arm or weapon of any kind for over thirty years.

Upon the above facts the petitioner will contend that he was in custody under said warrant *in violation of the constitution and laws of the United States*.

First—In violation of the constitution. That instrument establishes the supreme court of the United States and defines the jurisdiction which it may exercise. A law of Congress prescribes the number of justices of that court, divides the United States into nine circuits, under which one of the justices is assigned to each circuit. Mr. Justice Field is assigned to the ninth circuit, and is here now and he has been for some weeks in the discharge of his duties.

The conspiracy to take him from the discharge of his duties, or to injure him in his person, in consequence of the discharge of his duties heretofore, is a crime against the laws of the United States. The taking him into custody under a process issued in execution of such a conspiracy is a violation of a law of the United States, and a proceeding in furtherance of the commission of the crime forbidden. (Rev. Stats. sec. 5518.)

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Second—The issue of a warrant of arrest against an officer of the United States without any probable cause, and taking him into custody, is itself a violation of the constitution of the United States, as much as though issued without any information whatever.*

It is arresting a party *without due process of law*, for due process of law is required even in a preliminary arrest of a party, temporarily depriving him of his liberty, as well as in rendering judgment against his person or property.

The courts of the United States and the justices and judges thereof have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of the restraint of one's liberty. (Secs. 751, 752, Rev. Stats.) The power is general, as much so as that in the act of February 5, 1867, the language of which, as stated by Mr. Chief Justice Chase, in delivering the opinion of the supreme court in *Ex parte McCordle*, 6 Wall. 325, "brings ^{within} the habeas corpus jurisdiction of every court and of every judge, every possible case of privation of liberty, contrary to the national constitution, treaties, or laws." And the justice adds: "It is impossible to widen the jurisdiction."

Section 753 puts a limitation upon the cases to which the writ may extend, and declares that it shall extend in no case to a prisoner in jail; that is to say, a prisoner in custody, unless (among other cases) he "is in custody in violation of the constitution, or of a law or treaty of the United States." If in custody in violation of either he is to be discharged, no

* NOTE. — The Penal Code of California provides as follows, before a warrant of arrest for a criminal offense can be issued:—

Sec. 811. When an information is laid before a magistrate of the commission of a public offense, triable within the county, he must examine on oath the informant or prosecutor, and any witness he may produce, and take their depositions in writing, and cause them to be subscribed by the parties making them.

Sec. 812. The deposition must set forth the facts stated by the prosecutor and his witnesses, tending to establish the commission of the offense and the guilt of the defendant.

Sec. 813. If the magistrate is satisfied therefrom that the offense complained of has been committed, and that there is reasonable ground to believe that the defendant has committed it, he must issue a warrant of arrest.

None of the requirements of these sections were complied with. The warrant was issued upon the sole affidavit of Mrs. Terry, who did not see the homicide charged as murder. And an arrest on such a complaint and affidavit was held to be illegal by the supreme court of California in *Ex parte Dimmig*, 74 Cal. 164. —

matter from whom the process may issue under which he is held.

It would be most extraordinary if a justice of the supreme court of the United States could not be taken from persons who were seeking to kidnap him, so as to convey him to a place where they may commit a crime upon his person, a crime forbidden by the laws of the United States. If arrested under proceedings in execution of such crime he would be in custody in violation of a law of the United States, and could be discharged by any judge of a national court on a writ of habeas corpus under section 573.

The arrest of the petitioner created a profound sensation throughout the country, and expressions of intense indignation at the proceeding came from all quarters.

Hon. R. W. Waterman, governor of California, who was at the time of the arrest in the southern part of the state, on learning of it and the attending circumstances, at once wrote the following letter to the attorney-general of the state:—

“EXECUTIVE DEPARTMENT, STATE OF CALIFORNIA,

“SACRAMENTO, August 21, 1889.

“*Hon. G. A. Johnson, Attorney-General, Sacramento*—DEAR SIR: The arrest of the Hon. STEPHEN J. FIELD, justice of the supreme court of the United States, on the unsupported oath of a woman, who, on the very day the oath was taken, and often before, threatened his life, will be a burning disgrace to the state unless disavowed.

“I therefore urge upon you the propriety of at once instructing the district attorney of San Joaquin County to dismiss the unwarranted proceedings against him.

“The question of the jurisdiction of the state courts in the case of deputy United States marshal Neagle is one for argument. The unprecedented indignity on Justice Field does not admit of argument. Yours truly,

“R. W. WATERMAN, Governor.”

The attorney-general, shortly after the receipt of the governor's letter, wrote to the district attorney the following letter:—

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Opinion of the Court—Sawyer, C. J.

“ATTORNEY-GENERAL’S OFFICE, STATE OF CALIFORNIA,

“SACRAMENTO, August 24, 1889.

“*A. C. White, District Attorney, Stockton, Cal.* — DEAR SIR: In view of the fact that Mrs. Terry, who swore to a complaint against Justice Stephen J. Field, and who was not present at the shooting of her husband, and the further fact that there is no evidence to implicate Justice Field in said shooting, I think public justice demands that the charge against him be dismissed. The highest and lowest when accused are alike entitled to this immunity at hands of a fair-minded people, whose servants we are. If any evidence should come to light hereafter implicating any person in this matter of so much gravity, and which has occasioned so much regret, your discretion to proceed under a new complaint is not sought to be controlled, nor is this letter designed to have any bearing whatever on the case of the other defendant. Very truly yours,

“G. A. JOHNSON, Attorney-General.”

The district attorney of San Joaquin County, acting upon what he deemed the instructions of the attorney-general, filed the letter with the justice of the peace at Stockton who had issued the warrant of arrest, and moved that the charge against Justice Field be dismissed. The motion was granted, and the dismissal entered.

On the day to which the case was adjourned, August 27th, the petitioner with his counsel appeared in the circuit court, whereupon S. D. Wood, representing Sheriff Cunningham of San Joaquin County, presented a certified copy of the proceedings in Justice Swain’s court at Stockton, dismissing the warrant for the arrest of Justice Field. He said this was presented as a protection to Sheriff Cunningham, and it was handed to Judge Mesick of counsel for Justice Field. After inspecting it he stated to the court that it was correct in form, and he moved that the proceedings on habeas corpus on behalf of Justice Field be dismissed.

REMARKS OF JUDGE SAWYER.

Judge SAWYER, in dismissing the proceedings, said :—

“We are glad that the prosecution of Mr. Justice Field

has been dismissed, founded as it was upon the sole, reckless, and, as to him, manifestly false affidavit of one whose relation to the matters leading to the tragedy, and whose animosity toward the courts and judges who have found it their duty to decide against her, and especially toward Mr. Justice Field, is a part of the judicial and notorious public history of the country.

“It was, under the circumstances and upon the sole affidavit produced, especially after the coroner’s inquest, so far as Mr. Justice Field is concerned, a shameless proceeding, and as intimated by the governor of the commonwealth, if it had been further persevered in, would have been a lasting disgrace to the state.

“While a justice of the supreme court of the United States, like every other citizen, is amenable to the laws, he is not likely to commit so grave an offense as *murder*, and should he be so unfortunate as to be unavoidably involved in any way in a homicide, he could not afford to escape, if it were in his power to do so; and when the act is so publicly performed by another, as in this instance, and is observed by so many witnesses, the officers of the law should certainly have taken some little pains to ascertain the facts before proceeding to arrest so distinguished a dignitary, and to attempt to incarcerate him in prison with felons, or to put him in a position to be further degraded and perhaps assaulted by one so violent as to be publicly reported, not only then, but on numerous previous occasions, to have threatened his life.

“We are extremely gratified to find that through the chief magistrate and the attorney-general, a higher officer of the law, we shall be spared the necessity of further inquiry as to the extent of the remedy afforded the distinguished petitioner by the constitution and laws of the United States, or of enforcing such remedies as exist, and that the stigma cast upon the state of California by this hasty and, to call it by no harsher term, ill-advised arrest, will not be intensified by further prosecution.

“Since the state proceeding has been dismissed, let the petitioner be discharged and the writ of habeas corpus be dismissed.”

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Opinion of the Court—Ross, J.

UNITED STATES v. GOUJON.

DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA.

AUGUST 26, 1889.

1. **CRIMINAL LAW—SENTENCE—COMMUTATION FOR GOOD BEHAVIOR.**—The act of Congress, March 3, 1875, provides that a United States prisoner, confined in execution of any sentence in a prison of any state or territory, which has no system of commutation for its own prisoners, shall have a deduction of five days in each month in which no charge of misconduct shall be sustained against him. The Revised Statutes of the United States, section 5544, provides that in other cases such prisoner shall be entitled to the same credits applicable to other prisoners. *Held*, that as an act of California, amended March 14, 1881, provides for commutation for such prisoners only as are confined in the state prisons for terms of one year and over, a United States prisoner sent to the county jail for six months is entitled to no credits for good behavior.

Before Ross, District Judge.

At law. Application for release from imprisonment.

Mr. J. Marion Brooks, for petitioner.*Mr. A. W. Hutton*, United States Attorney.

Ross, J. The petitioner, who was on the fourth day of March, 1889, sentenced to be imprisoned in the county jail of Los Angeles County for the period of six months, and to pay a fine of five hundred dollars, upon conviction of the crime of smuggling cigars into the United States, claims, by reason of his good behavior during his imprisonment, to be entitled to a credit of five days for each month of his term, and therefore to be now entitled to be discharged.

The provisions of the United States statutes bearing on the subject are contained in the act of Congress of March 3, 1875 (1 Sup. Rev. Stats. 184), and in section 5544 of the Revised Statute, the first of which reads as follows: "All prisoners who have been or shall hereafter be convicted of any offense against the laws of the United States, and confined in execution of the judgment or sentence upon such conviction in any prison or penitentiary of any state or territory, which has no system of commutation for its own prisoners, shall have a deduction from their several terms of sentence of five days in each and every calendar month during which no charge of misconduct shall have

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been sustained against each severally, who shall be discharged at the expiration of his term of sentence less the time so deducted, and a certificate of the warden or keeper of such prison or penitentiary of such deduction shall be entered on the warrant of commitment.”

Section 5544 reads: “In other cases, all prisoners now or hereafter confined in the jails or penitentiaries of any state, for offenses against the United States, shall be entitled to the same rule of credits for good behavior applicable to other prisoners in the same jail or penitentiary.”

These provisions are perfectly plain and admit of but one construction. By its express terms the deductions provided for by the act of 1875 can be allowed only to prisoners confined in a state or territory having no system of commutation for its own prisoners; and as the state of California has such system, it necessarily results that the deductions provided for by that act do not apply to the case of the petitioner. The cases of offenders against the laws of the United States, confined in execution of a judgment or sentence upon conviction in a prison of any state or territory having a system of commutation for its own prisoners, are provided for by section 5544 of the Revised Statutes, above quoted, which gives to the prisoner confined in such state or territory for an offense against the United States the same rule of credits for good behavior, which by the law of the state or territory where the imprisonment is had, is applicable to other prisoners in the same prison. The system of commutation provided by the statute of California (Act Cal. 1880, as amended March 14, 1881) has no application to county jails, or to prisoners confined therein; and, in respect to prisoners confined in a state prison, no credit is allowed when the term of imprisonment is less than one year. (*In re Terry*, 37 Fed. Rep. 649; *United States v. Schroeder*, 14 Blatchf. 345.) Writ denied, and petition dismissed.

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Opinion of the Court—Deady, J.

SAMUEL CASE v. J. H. LOFTUS.

CIRCUIT COURT, DISTRICT OF OREGON.

AUGUST 26, 1889.

1. "SHORE" OR TIDE LANDS.—On the admission of a new state into the Union, the "shore" or tide lands therein, not disposed of by the United States prior thereto, become the property of the state.
2. *IDEM.*—RIGHT OF ACCESS TO.—The owner of land abutting on the "shore" or tide lands in this state, and not disposed of by the United States or the state, has a right of access from his land to the water, and may erect and maintain a private wharf there for his own convenience, so long as he does not materially interfere with the rights of the general public, and subject to the power of the legislature to regulate such use.

Before DEADY, District Judge.

Mr. James F. Watson, for plaintiff.*Mr. Lewis L. McArthur*, for defendant.

DEADY, J. This suit is brought to have the defendant enjoined from constructing a tramway along the northern shore of Yaquina Bay, near its mouth, in front of certain property belonging to the plaintiff, whereby access to the bay from said property is hindered and prevented.

It is alleged in the bill that the plaintiff is the owner of a tract of land in Benton County, Oregon, known as the Ocean House property, and worth fifteen thousand dollars, with a tavern on it, which cost six thousand dollars; that said property abuts on the northern shore of said bay, into which the plaintiff has constructed a private wharf, to and from which goods and passengers are transported across said shore between said bay and tavern; that Yaquina Bay is navigable for all ordinary vessels, and is within the ebb and flow of the ordinary tides of the Pacific Ocean, whereby said shore is daily covered and uncovered for an average distance of one hundred feet; that the defendant is wrongfully and unlawfully engaged in constructing a wooden tramway over and along said shore in front of said property, with intent to maintain the same there for at least three years, which will completely cut off and prevent access from said bay or wharf to said tavern, and *vice versa*, to the great damage of the plaintiff.

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The suit was brought in the circuit court of the state for the county of Benton, and removed here on the ground that the defense to the same arises under the laws of the United States.

Here a general demurrer was filed to the bill. On the argument the following points were made in support of the demurrer:—

1. The “shore” in question is tide land, and therefore presumably belongs to the state of Oregon.

2. The statutes of the state (Comp. of 1887, § 3599, et seq.) provide for the acquisition of tide lands by the owner of the abutting tract, but the plaintiff does not show any right thereunder.

3. The right to build or maintain the wharf by the plaintiff depends on the statute of the state, the common law or common usage; and neither the statute nor the common law confers any such right.

4. There is no usage in Oregon by which the plaintiff can construct or maintain this wharf.

5. A comparison of the maps in the surveyor-general’s office will show that the tide land in question is within the corporate limits of the town of Newport, as defined by the act of February 21, 1887, which gives the town the exclusive power to regulate the erection of private wharves thereon, which power is also given to the town by virtue of sections 4227 and 4228 of the Compilation of 1887.

By the statute of the state (Comp. 1887, sec. 5399), the commissioners for the sale of school lands are “authorized and required to sell . . . tide and overflowed lands on the sea-coast owned by the state,” as therein provided. This statute was passed on October 18, 1878. It gave the owner of land “abutting or fronting” on “the shore” of the Pacific Ocean, or of any bay, the preference as a purchaser of such shore or tide land for one year from the passage of the act.

This act was passed on the assumption that upon the admission of the state into the Union—February 14, 1859—the title to the lands covered by the tide then undisposed of by the United States passed by operation of law to the state. How or why this is so, except to bolster up some fanciful notion of state

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sovereignty, I never could perceive. But on the authority of *Pollard v. Hagan*, 3 How. 212, and *Weber v. Harbor Commissioners*, 18 Wall. 57, this court must recognize it as the law of the land.

In his dissenting opinion in *Pollard v. Hagan*, 3 How. 231, Mr. Justice Catron says: A doctrine has lately sprung up in the courts of Alabama (*tempus*, 1844), “assuming that all lands temporarily flowed with tide water were a part of the eminent domain and a sovereign right in the old states; and that the new ones when admitted into the Union, coming in with equal sovereign rights, took the lands thus flowed by implication as an incident of state sovereignty, and thereby defeated the title of the United States. . . . Although the assumption was new in the courts, it was not entirely so in the political discussions of the country. There it had been asserted that the new states coming in, with equal rights appertaining to the old ones, took the high lands as well as the low by the same implication now successfully asserted here, in regard to the low lands; and indeed, it is difficult to see where the distinction lies. That the United States acquired, in a corporate capacity, the right of soil under water, as well as of the high lands, by the treaty with France, cannot be doubted; nor that the right of soil was retained and subject to grant up to the time Alabama was admitted as a state.”

In *Hinman v. Warren*, 6 Or. 408, the court went further, and held that the United States cannot dispose of the tide lands even in a territory. This decision is also based on the dogma of state sovereignty; that is, the sovereignty of a state *in futuro*, which is yet, so to speak, *in utero*, or the womb of time, and may never be born.

The proposition is supported by the assertion, “that the United States government has no constitutional or statutory authority to so act towards a territory, or so dispose of the lands within a territory, as to make it impossible to admit such territory upon an equal footing with the other states of the Union.”

In *Gould on Waters*, section 40, it is said, this is the only adjudication on the subject of the power of the national govern-

ment, “while holding the title, to the soil of the tide waters,” to make a valid conveyance of the same.

The author adds: “The decisions of the supreme court of the United States have been thought to lead to the conclusion reached in *Hinman v. Warren*, *supra*, but it would seem there is no very direct expression of that view in the opinion of the court.”

The doctrine that new states must be admitted into the Union on an “equal footing” with the old ones does not rest on any express provision of the constitution, which simply declares (Art. 4, sec. 3): “New states may be admitted by Congress into this union;” but on what is considered and has been held by the supreme court to be the general character and purpose of the union of the states, as established by the constitution—a union of political equals. (*Pollard v. Hagan*, 3 How. 233; *Permoli v. New Orleans*, 3 How. 609; *Strader v. Graham*, 10 How. 92.)

But certainly this equality does not require that the new state shall be admitted to any right in the soil thereof, considered as property. The antirevolution states acquired no property in the soil thereof by entering into the Union. The lands that had not passed into private hands, they already owned and held, as the political successors of the British crown.

The true constitutional equality between the states only extends to the right of each, under the constitution, to have and enjoy the same measure of local or self-government, and to be admitted to an equal participation in the maintenance, administration, and conduct of the common or national government.

The pride of the new state may be touched at the thought of being the owner of the tide, swamp, and overflowed lands within its borders, and the tax-payer may flatter himself that the proceeds of their sale will lighten the burdens of taxation; but observation and experience in the new state tell a different tale. If aid is to be given to the new state out of the public lands within its borders, let Congress provide that it shall have a liberal percentage of all the sales of such land.

The soil of Oregon was acquired by the national government, by means of the discoveries, explorations, and occupation of

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the citizens of the United States; and it was so acquired for the benefit of all and not a part. In *Johnson v. McIntosh*, 8 Wheat. 595, Mr. Chief Justice Marshall, in considering the effect of a discovery of an uninhabited country, by persons who acknowledge some existing government, says: "The discovery is made for the benefit of the whole nation; and the vacant soil is to be disposed of by that organ of the government which has the constitutional power to dispose of the national dominions." And in *Martin v. Waddell*, 16 Peters, 409, Mr. Chief Justice Taney cites this language, and relies on this authority, in a case involving the right to the soil under the navigable waters of New Jersey. Congress is the organ of the national government that has the power to dispose of the territory and other property of the United States. (Con. Art. 4, sec. 3.)

In the territories the national government is both the sovereign and proprietor. Congress has the power to govern them, and in so doing exercises the combined power of the national and state governments. (*American Ins. Co. v. Canter*, 1 Peters, 542.) And as such sovereign and proprietor it may dispose absolutely of all the public land in the territory, whether high or low, wet or dry. For the time being, as sovereign, it has the *jus publicum*, or right of jurisdiction and control of the shores for the benefit of the public, as in the case of a public highway over private land; while as proprietor it has the *jus privatum*, or right of private property, subject to the *jus publicum*. (Gould on Waters, sec. 17.)

This *jus publicum*, whether held by the national government during the territorial period or the state thereafter, may be sold and disposed of by the legislature of either, who represent the public. (*Lansing v. Smith*, 4 Wend. 20; 21 Am. Dec. 89; *Gould v. Hudson R. Ry. Co.* 6 N. Y. 538; Gould on Waters, sec. 32.)

On the admission of the territory into the Union, the state, as the local sovereign or authority, succeeds to the *jus publicum*, except so far as may be necessary to enable the national government to make and maintain regulations of commerce. But it rests with Congress to say when a territory shall be admitted

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into the Union as a state. Can any one say when, if ever, Alaska will be admitted into the Union, on an equal footing with Ohio, Pennsylvania, and New York? For aught that appears, it will ever be but very sparsely populated. Its commercial value is principally as a splendid preserve for fish and fur; while as a summer-touring ground, and a place to get “far from the maddening crowd,” it is original and unequalled. Can it be possible that in the mean time the United States may not dispose of the private property in any of the “shore” of Alaska, which it purchased from Russia, but must hold it, willing or not, as trustee for some possible state or local sovereign that may arise or rule there in the far future? As well ask, it seems to me, if any grant or disposition of the shore in England by the crown, prior to Magna Charta, is binding on the succeeding sovereigns of the house of Hanover.

Assuming, as we must, in the present state of the decisions on the subject, that the “shore” or lands in Oregon, periodically covered by the tides and not disposed of by the United States while it was a territory, are the property of the state, what, on the showing here made, is the condition of the “shore” in question or the rights of the parties to this suit in relation thereto? There is nothing to show that it ever has been disposed of by either the state or the United States. By the act of 1887, *supra*, the state has authorized its sale. So far as appears, this sale may be made without qualification or reservation—a sale of both the *jus publicum* and the *jus privatum*. In which case the vendee would acquire the private property in the land and the right of the public to the use of the same, for the purpose of navigation or fishing.

Whether any reservation of the *jus publicum* has been made in the deeds executed by the commissioners to vendees under the act, I am not advised.

The plaintiff is the owner of land abutting on the “shore” of Yaquina Bay. How he acquired it, does not appear, and it may not be material. But the title must be derived from the United States, under some of the acts of Congress, providing for the disposition of the public lands in Oregon. Be this as it may, as a littoral proprietor, he has a right of access from his prem-

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ises to the water, and to erect and maintain a private wharf there, at which to land and embark, so long as he does not materially interfere with the rights of the public, and subject to the power of the legislature to regulate such use or privilege. (*Dutton v. Strong*, 1 Black, 25; *Schurmeir v. St. Paul etc. R. R. Co.* 7 Wall. 272; *Yates v. Milwaukee*, 10 Wall. 497; *Weber v. Harbor Commissioners*, 18 Wall. 57; Gould on Waters, secs. 124, 149, 151, 154.)

The defendant has no special right in the “shore” or to the use of it, beyond that of the general public, which does not include the right to construct or maintain a tramway or other structure upon or over it, that would prevent or substantially impair the littoral proprietor’s right or privilege of access to and from the water.

It does not appear from the bill that this tramway is in fact such a structure, or whether the rail or track is laid level with the sand or earth, or not. Presumably it is so. But it was admitted on the argument that it is twelve or fifteen inches above the surface of the ground, and therefore cannot be crossed by a wheeled vehicle, unless it is bridged.

Prima facie, then, the tramway is a nuisance, which works a special injury to the plaintiff, and the defendant ought not to be allowed to maintain it; and an injunction is the proper remedy for the wrong. (1 Pomeroy’s Equity Jurisprudence, sec. 252; Gould on Waters, sec. 21.)

The point made under the act of 1887 cannot now be considered. The facts on which it rests are not in the record, nor are they such as the court can take judicial notice of. It does not appear from the bill that the “shore” in question is within the corporate limits of Newport, or that the land of the plaintiff is.

In this opinion some possible aspects of this case are considered that are not absolutely necessary to the decision on this demurrer. But they were seriously propounded by the learned counsel for the parties, and the consideration of them invoked.

The demurrer is overruled.

UNITED STATES v. CUDDY.

DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA.

AUGUST 26, 1889.

1. PERJURY — INDICTMENT. — An indictment for perjury which charges that defendant took an oath before Judge R. in the United States district court, in open court, which oath was administered by the duly-authorized clerk, who had authority to administer the oath, in a matter then pending, that he would tell the truth, and that he did wilfully and corruptly swear to material matter which is set out in the indictment, is sufficient under the Revised Statutes of the United States, section 5392, declaring such a person swearing to any material matter which he does not believe to be true to be guilty of perjury, and section 5396, providing that it shall be sufficient to set forth the substance of the offense charged, and by what court, and before whom the oath was taken, with proper averments to falsify the matter wherein the perjury is assigned.

Before Ross, District Judge.

On indictment for perjury.

Mr. A. W. Hutton, United States Attorney.

Ross, J. The question in this case is as to the sufficiency of the indictment, which charges that defendant, at a certain time and place, within the jurisdiction of this court, "after having taken an oath before the Honorable E. M. Ross, judge of said court, which oath was administered to the said Cuddy in open court on said day by E. H. Owen, the duly-appointed, qualified, and acting clerk of said court, he, the said Owen, as such, being then and there a person having competent authority to administer said oath, that in the matter then and there pending, entitled *In the Matter of the Contempt of Thomas J. Cuddy*, he would tell the truth, the whole truth, and nothing but the truth, then and there wilfully, falsely, corruptly, and contrary to such oath, did state certain material matter in his testimony then and there adduced, in open court as aforesaid, at the time and in the manner aforesaid, being in words and substance as follows, to wit: 'I didn't know that Mr. McGarvin, or any other gentleman in particular, would be called on this occasion. [Meaning the trial of the case of *The United States v. W. More Young*, which was a criminal cause pending against the said Young in the said court, and set for

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trial for February 12, 1889.] I never dreamed that he was to be a jurymen, and don't now. [Meaning a juror in the cause last above named.] I didn't know Mr. McGarvin was a juror. Didn't know anything about it. Didn't give the matter a thought. [Meaning that he, the said Cuddy, didn't know that the said McGarvin was a petit, to wit, a term-trial juror in said court at the time and at the place first above named.] I had no idea that Mr. McGarvin was one of them at this time. I didn't know anything about it.' (Meaning, by the words 'one of them,' one of the term-trial jurors duly impaneled and sworn in the said court, as aforesaid.) Whereas, in truth and in fact, the said Thomas J. Cuddy did know that the said Robert McGarvin was a petit, to wit, a term-trial juror duly impaneled and sworn in said court, at all the times hereinbefore recited; and so the jurors aforesaid, upon their oath aforesaid, do say that the said Thomas J. Cuddy, on the said thirteenth day of February, in the year of our Lord one thousand eight hundred and eighty-nine, in the said city of Los Angeles, county and state and district aforesaid, in the United States district court within and for the district of California, in open court as aforesaid, before the said E. H. Owen, being then and there a competent person to administer said oath, the laws of the United States authorizing said oath to be administered in said matter, by the said Thomas J. Cuddy's own act and consent, in manner and form as aforesaid, did commit wilful and corrupt perjury."

The United States statute defining perjury is as follows: "Every person who, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, wilfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall be punished" in a prescribed way. (Rev. Stats. sec. 5392.)

And section 5396 of the Revised Statutes provides that: "In every presentment or indictment prosecuted against any person for perjury, it shall be sufficient to set forth the substance

of the offense charged upon the defendant, and by what court, and before whom the oath was taken, averring such court or person to have competent authority to administer the same, together with the proper averment to falsify the matter wherein the perjury is assigned, without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceeding, either in law or equity, or any affidavit, deposition, or certificate, other than as hereinbefore stated, and without setting forth the commission or authority of the court or person before whom the perjury was committed.”

The last section is in substance the same as the enactment of 23 Geo. II. c. 11, which was designed to do away with the needless prolixity and precision required by the statute of 5 Eliz. c. 9, which oftentimes resulted in the escape of those guilty of the crime of perjury. The averments in a case of this character are, as said by Mr. Bishop, necessarily of two classes: those which disclose a foundation for the commission of the offense commonly called inducement, and those which charge the offense itself. The latter, being that whereof the defendant is accused, must be direct and specific; but the former may be charged in general terms. (2 Bishop's Criminal Procedure, sec. 901, et seq.) But, while the matter of inducement may be generally stated, the allegations respecting it must be sufficient to show that the oath was taken before a competent tribunal, officer, or person, and in a case in which the laws of the United States authorize the oath to be taken. Where, as in the present case, the false swearing is alleged to have been committed in a matter or proceeding in open court, the allegations must be sufficient to show that the matter or proceeding was one in which the court was competent to act. To hold otherwise would be to hold that false swearing, in a matter or proceeding of which the court had no jurisdiction, constitutes perjury, which cannot be affirmed. (2 Bishop on Criminal Law, sec. 1020; 2 Wharton's Criminal Law, sec. 1288, et seq.; 2 Bishop's Criminal Procedure, secs. 905, 910; and numerous cases cited in the note to the case of *State v. Shupe*, 16 Iowa, 36; 85 Am. Dec. 485.)

Now, looking at the indictment, it is seen that it charges that

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at a certain named time and place, within the jurisdiction of this court, the defendant took an oath in the United States district court—which oath was administered to him in open court by E. H. Owen, the duly-appointed, qualified, and acting clerk of said court, and who was then possessed of competent authority to administer it—that in the matter then pending in said court, entitled *In the Matter of the Contempt of Thomas J. Cuddy*, he would tell the truth, the whole truth, and nothing but the truth, then and there wilfully, falsely, corruptly, and contrary to such oath, did state certain material matter in his testimony then and there adduced, which is specifically set out in the indictment. The materiality of the testimony is sufficiently alleged, and the allegation falsifying the alleged material matter is also sufficient. I see no force in the suggestion that there is no allegation that defendant swore falsely to a material matter which he did not believe to be true. The allegation is that he wilfully and corruptly swore to material matter which he knew to be false. He could not believe to be true that which he knew to be false. If there was nothing further in the indictment to show that the matter in which the alleged false swearing was committed was one of which the court had jurisdiction, than the allegation that the alleged false testimony was given in a matter then pending in the district court, entitled *In the Matter of the Contempt of Thomas J. Cuddy*, I would be inclined to think the indictment fatally defective; but the indictment does further aver that the laws of the United States authorized said oath to be administered in said matter. Since all of this, as has been seen, is matter of inducement, and may be stated generally, and since the court must have jurisdiction over a matter pending therein in which the laws of the United States authorize an oath to be administered, I am of opinion that the indictment does sufficiently show that the court had jurisdiction of the matter in which the perjury is alleged to have been committed. Demurrer overruled.

HENRY C. WILSON v. NEHEMIAH FINE.

CIRCUIT COURT, DISTRICT OF OREGON.

SEPTEMBER 3, 1889.

1. ENTRY AND CERTIFICATE UNDER THE HOMESTEAD LAW.—An entry and certificate issued to a settler under the homestead act, for land subject to entry thereunder, cannot be set aside or canceled by the land department on its own motion, for fraud or mistake committed or occurring in obtaining or issuing it. In such case the government must seek redress in the courts, where the matter may be heard and determined according to the law applicable to the rights of individuals under like circumstances. (*Smith v. Ewing*, 11 Sawy. 56, affirmed.)

Before DEADY, District Judge.

Mr. Charles B. Bellinger, for plaintiff.*Mr. Albert H. Tanner*, for defendant.

DEADY, J. This suit is brought to recover the possession of a quarter section of land, situate in Lake County, Oregon.

From the amended complaint it appears that the plaintiff is a citizen of California and the defendant a citizen of Oregon; that about three years before the commencement of this action (February 27, 1889), one G. C. Alexander duly received a final certificate to the premises, as a settler thereon under the homestead law, from the proper officers of the land department of the United States, who thereafter duly conveyed the same to the plaintiff; that the plaintiff is the owner of the premises in fee and entitled to the possession thereof; that about January 1, 1889, the plaintiff being in the possession of the premises, as such owner, the defendant entered thereon and evicted him therefrom, and now wrongfully withholds the possession from him.

The defendant demurred to the complaint, for that it did not appear that the plaintiff had the legal title, without which the action for possession could not be maintained in this court.

After the argument the demurrer was overruled, the court holding that the prior possession of real property is a sufficient legal estate therein to enable a party to maintain an action in this court to recover the possession of the same from an intruder.

The defendant then answered. The answer contains specific

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denials of sundry allegations of the complaint, and also two defenses, each of which is styled therein “a further answer and defense,” although there is but one answer, containing these denials and defenses. (Comp. 1887, secs. 71, 72.)

The first defense is that at and prior to the entry of the premises by Alexander, the same was public land of the United States, and subject to entry under the homestead law at Lakeview, Oregon; that prior to his settlement on the premises, Alexander had acquired a quarter-section of public land under said law in California, and was not entitled at the time of such entry, and the issue of said final certificate, to enter on or settle upon any of the public land under the homestead law; and that said entry and certificate are illegal and void, of all which the plaintiff had notice before the date of the conveyance from Alexander.

The second defense is, that the officers of the land office at Lakeview, Oregon, “having been informed,” after the issue of the certificate to Alexander, that he had acquired a quarter-section of land under the homestead law prior to his settlement on the premises, set aside and canceled said entry and certificate, and reported the facts to the commissioner of the general land office, who thereupon canceled said entry and certificate on April 27, 1889; that said Alexander was duly notified of said “proceeding” before said officers, and appeared and was heard therein; that about January 1, 1889, the defendant, “with the advice and consent” of the register and receiver, settled on the premises with the intention of claiming the same under the homestead law, he being qualified so to do, and “went into the peaceable possession of the same, and ever since has been and now is in possession of such land, as such settler, and is entitled to remain in the possession thereof, in accordance with the provisions of said law and the regulation of the interior department, and within the time allowed by law he offered to file his homestead application and perfect his entry” in the land office at Lakeview; “and has been instructed and advised by the commissioner of the general land office to remain in possession of said land, as such settler, and that he was at the time of the commencement of this action, and ever since

has been and is now in the possession of the land described in the complaint, under the authority and by the direction of the department of the interior and the commissioner of the general land office,” of all which the plaintiff had notice at the time of the conveyance to him from Alexander. To these defenses a demurrer is interposed.

The second defense will be considered first. It admits by necessary implication that Alexander obtained the certificate for the land under the homestead act, by complying with the provisions thereof, including the payment of the price and the five years’ residence and cultivation, about February, 1886.

To avoid the effect of these facts, it is alleged in the defense that the officers of the district land office, “having been informed” that Alexander had had the benefit of the homestead act, of their own motion instituted a “proceeding” to set aside and cancel said certificate on that account, which was done and reported to the commissioner, who, on their recommendation, affirmed their action.

It matters not what advice or direction was given the defendant by any officer of the land department concerning the possession of the premises. Neither of them had any power or authority to authorize or direct him to take possession of the land, and it is not credible that they even did do so. If the law and the facts warranted him in taking possession of the premises, well and good, otherwise not. The fiat of an officer of the land department is not law, nor is this a government by Pasha.

I think this so-called “proceeding” to cancel Alexander’s entry and certificate was an arbitrary and illegal one. There was no contest about the matter, which the law authorizes the register and receiver to hear and decide, subject to an appeal to the commissioner and thence to the secretary of the interior. When the certificate had issued without objection, the time for a contest had passed. Upon its issue the land became the property of Alexander, and he was entitled to the patent therefor. Such a right cannot be arbitrarily set aside, canceled, and avoided by the land department, in a “proceeding” self-instituted, on mere hearsay.

Nor does it signify that the party had notice of the “pro-

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ceeding” and took part in it. One may defend one’s life or property when it is attacked, without acknowledging the legality of the attack or “proceeding,” or being bound by the result of it.

If Alexander was not entitled to make the entry, for the reason that he had already had the benefit of the act, the certificate may be set aside on that ground in the courts where the matter may be heard and determined according to the law applicable to the rights of individuals under like circumstances. (*Smith v. Ewing*, 11 Sawy. 56.)

In this case, I had occasion to consider this question, of the power of the land department, of its own motion, to recall, set aside, or cancel, a certificate of purchase of public lands, regularly issued and valid on its face, and concluded that it did not exist. It was there held (p. 65): “The right of a party holding a certificate of purchase of public land, and that of his grantor, is a right in and to property of which neither of these can nor ought to be deprived without due process of law.”

Since the decision of this case, *Cornelius v. Kessel*, 128 U. S. 456, has been decided by the supreme court. The general drift of the opinion is to limit and restrain the power of the commissioner of the general land office, to set aside or cancel entries or certificates, allowed by the register and receiver. The pith of the opinion on this point is stated in one of the syllabi as follows:—

“The power of supervision possessed by the commissioner of the general land office over the acts of the register and receiver of the local land offices is not unlimited or arbitrary, but can only be exerted when an entry is made upon false testimony, or without authority of law; and cannot be exercised so as to deprive a person of land lawfully entered and paid for.”

All applications for entries of land under the homestead act are noted on the books and plats of the district land office, and a register kept of the same. These facts, “together with the proof upon which they have been founded,” are returned to the general land office. (Sec. 2295, Rev. Stats.) When it appears from such return, together with the record of the surveys of the public lands, and the prior disposition thereof in the general

land office, that an entry has been allowed in the district land office contrary to law, the commissioner has power, and it is his duty, to correct the error and disallow the entry.

But if, after the entry is made and the certificate is issued, some one should offer to enter the same land on the ground that the first entry is illegal, and propose to show the same by new and extraneous proof, I can find no law that authorizes the register and receiver, or the commissioner, to institute or direct a "proceeding," to hear and determine the matter, and therein set aside or cancel the entry and certificate. The subject is no longer administrative in its character. It ceased to be so, so far as the register and receiver are concerned, when, upon the final proof, after notice to the world of the settler's five years' residence and cultivation, the certificate was issued to him.

Admitting the power of the commissioner to disallow an entry for reasons appearing on the face of the return, made by the register and receiver concerning the same, thereafter and otherwise, the validity and effect of the certificate, as evidence of the right of the settler to the land described therein, can only be impeached in a judicial proceeding.

If upon inquiry the land office finds that through fraud or mistake a certificate was improperly issued, a suit should be brought in the proper court to set aside and cancel the same. Such a suit is quite as simple and inexpensive as a hearing in the land department, and much more likely to be attended with correct and satisfactory results.

The allegation in this defense, that the defendant took peaceable possession of the premises, and still holds them so, amounts, under the circumstances, to nothing more than an admission that the defendant entered upon the possession of the premises, but without force or violence, and still holds them so. This is not an action of forcible entry and detainer, and although the complaint alleges that the defendant entered "unlawfully and with force," proof of an unlawful entry and holding will support the action.

The demurrer to this defense is sustained.

The first defense consists simply of the allegation that Alexander, by reason of his having had the benefit of the homestead

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act, was not entitled to settle upon and acquire the title to the premises under said act.

This defense, also, by a necessary implication, admits that Alexander acquired the possession of the land under the homestead act, in the manner therein provided, and that the defendant, without even a claim of right, title, or interest in the premises, entered thereon and deprived the plaintiff of the possession thereof, as alleged in the complaint.

The demurrer to this defense is also sustained.

WELDT v. THE HOWDEN.

DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA.

SEPTEMBER 11, 1889.

1. **PILOTS—PORTS.**—A vessel lying under the protection of Point Fermin, which is a well-defined headland on the northerly side of the bay of San Pedro, will be held to be within that bay in the absence of any legally defined limits thereof.
2. **IDEM.**—Where it appears that such bay and the port of Wilmington have always been locally regarded as identical, and that Congress, by legislation, has recognized San Pedro as a port, and changed its name to that of the port of Wilmington, and referred to the bay as the bay of Wilmington, such bay will be held a port, within the Political Code of California, section 2436, providing for compensation to pilots at "ports," irrespective of its merits as a harbor.

Before Ross, District Judge.

In admiralty. Libel to recover half pilotage.

Mr. Stephen M. White, for libellant.

Messrs. Mortimer & Harris, for respondent.

ROSS, J. At the times stated in the pleadings, the libellant was a duly licensed pilot "for the port of Wilmington and bay of San Pedro," and, as such, spoke the British bark Howden, bound for San Pedro, and tendered his services as pilot. His services being declined by the master of the bark, libellant commenced the present proceeding, claiming to be entitled to half the usual rate of pilotage by virtue of section 2436 of the Political Code of California, which provides, among other

things, that pilots for all of the ports of this state other than San Francisco, Mare Island, Benicia, and Humboldt Bay, are entitled to receive for piloting every vessel into or out of port the sum of eight dollars per foot draught, and that, when the person commanding any vessel refuses to take a pilot, the pilot first offering his services is entitled to half pilotage.

That the state has the right to impose half pilotage on foreign vessels entering the ports of the state, and declining the services of a pilot, was decided by Judge HOFFMAN in *Alameda v. Neal*, 31 Fed. Rep. 366, and his ruling was affirmed on appeal by Mr. Justice FIELD, 32 Fed. Rep. 331. In the present case that right is conceded by the respondent, but the defense is made—*First*, that the Howden was not bound for and did not enter the port of Wilmington or the bay of San Pedro; and, *second*, that if she did enter the bay, that that bay is not a port within the meaning of the pilot laws; that the only port at that point on the coast is the port of Wilmington, and that the port of Wilmington and the bay of San Pedro are not one and the same, but on the contrary, that they are two totally distinct geographical places.

The case shows that the limits of the bay of San Pedro have never been defined by any competent authority; nor is the line that separates the bay from the ocean attempted to be delineated upon the United States coast survey chart. Indeed, it may not be an easy matter to define it, for the reason that while upon the northerly side of the bay there is a well-defined headland, called "Point Fermin," there is none to the southward within such a distance as that it may be reasonably said to have any connection with the bay of San Pedro. In the absence of any legally defined limits to the bay, I think it fair to hold that all vessels that lie under the protection of Point Fermin are within the bay of San Pedro; and that the Howden was in that position I think appears from the evidence.

The bay of San Pedro and the port of Wilmington, it seems from the evidence, have always been locally known and regarded as one and the same. Originally, all vessels coming into those waters discharged their cargo at San Pedro, and from there the freight was sent by wagon to Los Angeles. San Pedro was,

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and is, a little settlement or town on the bay of that name. In 1852, General Phineas Banning was conducting the principal business there, and as he was located on the government reservation at that place, he was required to move off. Somewhere about the latter part of 1853 he removed his business from San Pedro and established it at Wilmington, which is situated on an inlet a few miles further inland. Not only have the bay of San Pedro and the port of Wilmington been locally regarded as one port or harbor, but that they are and have been so regarded by Congress is clearly shown from the following legislation: By an act approved September 28, 1850, the town of San Pedro was constituted a port of delivery in the collection district of San Diego. (9 U. S. Stats. 508.) By an act approved August 3, 1854, the collection district of San Pedro was created, and San Pedro was made the port of entry for said district. (10 U. S. Stats. 345.) By an act approved June 2, 1862, the collection district of San Pedro was abolished, and the same was attached to the district of San Francisco. (12 U. S. Stats. 411.) By section 2582 of the Revised Statutes, the state of California was divided into two collection districts, the first being the district of San Diego, in which San Diego was made the sole port of entry, and San Pedro and Santa Barbara ports of delivery. By an act approved June 6, 1874, the name of the port of San Pedro was changed to that of Wilmington. (18 U. S. Stats. 61.) By an act approved June 10, 1880, the privilege of immediate transportation was extended to various named ports; among others, to that of Wilmington. (21 U. S. Stats. 174.) And by an act approved June 16, 1882, the collection district of Wilmington was created, in which Wilmington, on the bay of Wilmington, was made the sole port of entry. (22 U. S. Stats. 105.) By the legislation referred to not only did Congress recognize the fact that there was a port at San Pedro, but by changing the name of the port of San Pedro to that of Wilmington, and by referring to the bay of San Pedro as the bay of Wilmington, it gave unmistakable evidence that it regarded the one as identical with the other. Whether or not the port is a good and safe harbor does not affect the question. It is a place for which many vessels are bound, and at which it is

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usual for them to load and unload; and it is the place for which the Howden was bound, and at which she discharged her cargo.

In my opinion the libellant is entitled to half the usual rate of pilotage, as provided by section 2436 of the Political Code of California; and accordingly a decree will be signed for libellant, with costs.

IN RE NEAGLE.

CIRCUIT COURT, NORTHERN DISTRICT OF CALIFORNIA.

SEPTEMBER 16, 1889.

1. **UNITED STATES COURTS—JURISDICTION—HABEAS CORPUS.**—Under the provisions of sections 751 to 753 of the Revised Statutes, the courts of the United States and their judges have jurisdiction, upon a writ of habeas corpus, to inquire into the cause of the imprisonment of the petitioner; and if, upon such inquiry, he is found to be “in custody for an act done or omitted, in pursuance of a law of the United States,” he is entitled to be discharged, no matter from whom, or under what authority, the process under which he is held may have issued; the constitution, and laws of the United States made in pursuance thereof, being the supreme law of the land.
2. **IDEM.**—In the exercise of this jurisdiction there is no conflict of authority between the state and the United States. The laws of the United States being the supreme law of the land, the authority of the state in such cases is subordinate, and that of the United States paramount.
3. **CONSTITUTIONAL LAW—STATE LAWS.**—A state law which contravenes a valid law of the United States is void. In legal contemplation, there can no more be two valid conflicting laws, operating upon the same subject-matter, at the same time, than, in physics, two bodies can occupy the same space at the same time.
4. **IDEM—LAWS OBSTRUCTING UNITED STATES OFFICER.**—The United States is a government with authority extending over the whole territory of the Union, acting upon the states, and the people of the states. While limited in the number of its powers, it is, so far as its sovereignty extends, supreme. No state can exclude it from exercising those powers, obstruct its authorized officers, against its will, or withhold from it the cognizance of any subject which the constitution has committed to it.
5. **IDEM.**—The constitution and laws of the United States, as to those matters wherein they are supreme, extend over every foot of the territories of the United States, and the jurisdiction of their courts to enforce rights derived thereunder is as extensive as the territory to which they are applicable.
6. **IDEM—RIGHT OF NATIONAL GOVERNMENT TO PRESERVE ORDER.**—The national government has power to command obedience to its laws, to preserve order, and to keep the peace, in matters affecting national interests, and no person or power in the land has a right to resist or question its authority so long as it keeps within the bounds of its jurisdiction.
7. **IDEM—PROTECTION OF JUDGES.**—It is within the power of the government of the United States to protect all the agencies and instrumentalities necessary to accomplish the objects and purpose of that government. It is therefore empowered to protect the lives of the judges of its courts from assault and assas-

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- sination, on account of their judicial decisions, by desperate, disappointed litigants, not only while actually holding court, but while such judges are traveling through their circuits for the purpose of holding courts at the different places therein appointed by law for that purpose.
8. **POWERS OF UNITED STATES MARSHAL.**—An assault upon, or an assassination of, a judge of the United States court, while engaged in any matter pertaining to his official duties, on account or by reason of his judicial decisions or action in performing his official duties, is a breach of the national peace affecting the authority and interests of the United States, and within the jurisdiction and power of the United States marshal or his deputies to prevent, as a peace officer of the national government.
9. **IDEM.**—By section 788 of the Revised Statutes, and the several provisions of the statutes of California prescribing the duties of sheriffs, by that section made applicable to marshals, the United States marshal is made a peace officer, and as such, he is authorized to preserve the peace, so far as a breach of the peace affects the authority of the United States, and obstructs the operations of the government and its various departments. The courts of the United States must be enabled fully to perform all the functions imposed upon them by the constitution and laws, without hindrance or obstruction, and they have the inherent power to protect themselves by and through their executive officers, under the direction and supervision of the attorney-general and the President, against obstruction and hindrance in the performance of their judicial duties.
10. **IDEM—HOMICIDE BY MARSHAL—HABEAS CORPUS—JURISDICTION.**—Where a deputy United States marshal, acting under instructions from his superior officers—the United States marshal and the attorney-general—in protecting the life and person of a justice of the supreme court of the United States from a murderous assault, made on account of his judicial decisions, at the hands of a dissatisfied litigant, finds it necessary to take the life of the assailant, and is arrested by the state authorities, and held upon a charge of murder for such act, the United States circuit court may, upon habeas corpus, discharge such United States officer from the custody of the state authorities, upon it being shown that the homicide was necessary, or that it was reasonably apparent to the mind of the deputy marshal, at the time and under the circumstances surrounding him, that the killing was necessary in order to protect and defend the justice from great bodily injury, or to save his life.
11. **IDEM.**—The homicide in such case, if an offense at all, is an offense under the laws of the state, and only the state can deal with it in that aspect. It is not claimed to be a crime punishable under the laws of the United States. But the homicide, when necessarily committed by a deputy marshal in the performance of his duty, in protecting the life and person of a justice of the United States supreme court from assault and violence because of his judicial decisions, is an “act done in pursuance of a law of the United States,” and is not and cannot, therefore, be an offense against the laws of the state, no matter what the statute of the state may be; the laws of the United States being the supreme law of the land.
12. **IDEM.**—It is the exclusive province of the United States courts to ultimately and conclusively determine any question of right, civil or criminal, arising under the laws of the United States. It is therefore the prerogative of the national courts to construe the national statutes, and determine, upon habeas corpus, whether a homicide for which the petitioner is charged with murder by the state authorities was the result of an “act done in pursuance of a law of the United States;” and, when that question has been determined in the affirmative, the prisoner will be discharged, and the state has nothing more to do with the matter.

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13. **IMPLIED POWERS OF THE NATIONAL GOVERNMENT.**—All the law of the United States is not specifically expressed in statutory enactments. Many powers are necessarily inherent in the various departments of the government, without which the government could not perform functions necessary to its existence. The exercise of such powers is, nevertheless, in pursuance of the laws of the United States.
14. **IDEM — STATUTES — CONSTRUCTION.**—When statutes confer powers, impose duties, and provide for the accomplishment of various objects, they are necessarily couched in general terms, but they carry with them, by implication, all the powers, duties, and exemptions necessary to accomplish the objects thereby sought to be attained.
15. **ACTS OF HEADS OF GOVERNMENTAL DEPARTMENTS.**—The acts of the heads of departments of the United States government, in the line of their duties, are, in contemplation of law, the acts of the President himself.
16. **HOMICIDE — KILLING IN DEFENSE OF ANOTHER.**—A party resisting a murderous assault, where several lives are in danger, being in the best position to judge as to the dangers and requirements of the occasion, is the one to determine when the proper moment has arrived, in self-defense, to slay his assailant, in order to be justified by the law; and if he acts in good faith, with reasonable judgment and discretion, the law will justify him, even though he errs. Where several lives are in danger from the assault of a powerful, infuriated, desperate man, common prudence would dictate that the party assailed should fire a second or two too soon, rather than a fraction of a second too late.

Before SAWYER, Circuit Judge, and SABIN, District Judge.

Habeas corpus.

This is an application for the discharge of David Neagle upon a writ of habeas corpus. It arises out of the following facts: On the 3d of September, 1888, certain cases were pending in the circuit court of the United States for the Northern District of California, between Frederick W. Sharon, as executor, against David S. Terry and Sarah Althea Terry, his wife, and between Francis G. Newlands, as trustee, and others, against the same parties, on demurrers to bills to revive and carry into execution the final decree of the court in the suit of *William Sharon v. Sarah Althea Hill*, and were decided on that day. That suit was brought to have an alleged marriage contract between the parties adjudged to be a forgery, and obtain its surrender and cancellation. The decree rendered adjudged the alleged marriage contract to be a forgery, and ordered it to be surrendered and canceled. The decree was rendered after the death of William Sharon, and was therefore entered as of the day when the case was submitted to the court. By reason of the death of Sharon, it was necessary, in order to execute the

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decree, that the suit should be revived. Two bills were filed, one by the executor of the estate of Sharon; and the other, a bill of revivor and supplemental by Newlands, as trustee, for that purpose. In deciding the cases, the court gave an elaborate opinion upon the questions involved, and, while it was being read, certain disorderly proceedings took place, for which the defendants, David S. Terry and his wife, were adjudged guilty of contempt, and ordered to be imprisoned. The following is an accurate statement of those proceedings, slightly condensed from the opinion of the court delivered on the subsequent application of David S. Terry to have the order of commitment revoked. For the whole proceeding, see *In re Terry Contempt*, 13 Sawy. 440.

Shortly before the court opened, the defendants came into the court-room, and took their seats within the bar at the table next to the clerk's desk, and almost immediately in front of the judges; the defendant, David S. Terry, being at the time armed with a bowie-knife, concealed on his person, and the defendant, Sarah Althea, his wife, carrying in her hand a small satchel, which contained a revolver of six chambers, five of which were loaded. The court at the time was held by the justice of the supreme court of the United States allotted to this circuit, who was presiding, the United States circuit judge of this circuit, and the United States district judge of the district of Nevada, called to this district to assist in holding the circuit court. Almost immediately after the opening of the court, the presiding justice commenced reading its opinion in the cases mentioned, but had not read more than one fourth of it when the defendant, Sarah Althea Terry, arose from her seat, and asked him, in an excited manner, whether he was going to order her to give up the marriage contract to be canceled. The presiding justice replied: "Be seated, madam." She repeated the question, and was again told to be seated. She then cried out, in a violent manner, that the justice had been bought, and wanted to know the price he held himself at; that he had got Newlands' money for his decision, and everybody knew it, or words to that effect. It is impossible to give her exact language. The judges and parties present differed as to the pre-

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cise words used, but all concurred as to their being of an exceedingly vituperative and insulting character. The presiding justice then directed the marshal to remove her from the court-room. She immediately exclaimed that she would not go from the room, and that no one could take her from it, or words to that effect. The marshal thereupon proceeded towards her to carry out the order for her removal, and compel her to leave, when the defendant, David S. Terry, rose from his seat, evidently under great excitement, exclaiming, among other things, that "no living man shall touch my wife," or words of that import, and dealt the marshal a violent blow in his face. He then unbuttoned his coat, and thrust his hand under his vest, where his bowie-knife was kept, apparently for the purpose of drawing it, when he was seized by persons present, his hands held from drawing his weapon, and he himself forced down on his back. The marshal then removed Mrs. Terry from the court-room. Soon afterwards Mr. Terry was allowed to rise, and was accompanied by officers to the door leading to the corridor on which was the marshal's office. As he was about leaving the room, or immediately after stepping out of it, he succeeded in drawing his knife, when his arms were seized by a deputy marshal and others present, to prevent him from using it, and they were able to take it from him only after a violent struggle. The petitioner, Neagle, wrenched the knife from his hand, while four other persons held onto the arms and body of Terry, one of whom presented a pistol to his head, threatening at the same time to shoot him if he did not give up the knife. To these threats Terry paid no attention, but held onto the knife, actually passing it during the struggle from one hand to the other. Mr. Cross, a prominent attorney, who on that occasion sat next to Mrs. Terry, a little to her left and rear, testifies that, just before she arose to interrupt Justice Field, she nervously worked at the clasp of a small satchel about nine inches long, and tried to open it; and not succeeding, in consequence of her excitement, she hastily sprang to her feet, and interrupted the justice, as hereinbefore stated. Knowing that she had before drawn a pistol from a similar satchel in the master's room, he concluded at this time that she was trying to get her pistol out, and he

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consequently held himself in readiness to seize her arm as soon as it should appear, and endeavor to prevent its use until he could get assistance, his right arm being partially disabled. For one occasion in the master's office, see *Sharon v. Hill*, 11 Sawy. 123. At this time Mrs. Terry sat directly in front of Justice Field and the circuit judge, less than four yards from either. A loaded revolver was afterwards taken from this satchel by the marshal. For their conduct and resistance to the execution of the order of the court, the defendants, Sarah Althea Terry and David S. Terry, were adjudged guilty of contempt, and ordered to be imprisoned, the former for thirty days, and the latter for six months.

In consequence of the imprisonment which followed, various threats of personal violence to Justice Field and the circuit judge were made by Terry and his wife. Those threats were that they would take the lives of both of those judges. Those against Justice Field were sometimes that they would take his life directly; at other times, that they would subject him to great personal indignities and humiliations, and if he resented it, they would kill him. These threats were not made in ambiguous terms, but openly and repeatedly, not to one person, but to many persons, until they became the subject of conversation throughout the state, and of notice in the public journals. Reports of these threats through the press, and through reports of the United States marshal and United States attorney, reached Washington, and in consequence of them the attorney-general thought proper to give instructions to the marshal of the United States for the Northern District of California to take proper measures to protect the persons of those judges from violence at the hands of Terry and his wife. On the return of Justice Field from Washington to attend his circuit in June last, the probability of an attack by Judge Terry upon him was the subject of conversation throughout the state, and of notices in some of the journals in the city of San Francisco. It was the general expectation that if Judge Terry met Justice Field, violence would be attempted upon the latter. In consequence of this general belief and expectation, and the fact that the attorney-general of the United States had given instructions

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to the marshal to see that the persons of Justice Field and of the circuit judge should be protected from violence, the marshal of the northern district appointed the petitioner in this case, David Neagle, to accompany Mr. Justice Field while engaged in the performance of his duties, and while passing from one district to another within his circuit, so as to guard him against the threatened attacks. He was specially commissioned as a deputy by Mr. Franks, whose instructions to him were that he should protect Justice Field at all hazards, and knowing the violent and desperate character of Terry, that he should be active and alert, and be fully prepared for any emergency, but not to be rash; and in case any violence was attempted from any one, to call upon the assailant to stop, and to inform him that he was an officer of the United States. Judge Terry was a man of great size and strength, who had the reputation of being always armed with a bowie-knife, in the use of which he was specially skilled, and of showing great readiness to draw and use it upon persons towards whom he entertained any enmity, or had any grievance, real or fancied.

On the 8th of August, 1889, Justice Field left San Francisco for Los Angeles, in order to hear a habeas corpus case which was returnable before him at that city on the 10th of August, and also to be present at the opening of the court on the 12th. He was accompanied by Deputy Marshal Neagle, the petitioner. Justice Field heard the habeas corpus case on the 10th of August. On the 12th of August he opened the circuit court, Judge Ross sitting with him, and he delivered on the latter day an opinion in an important land case, and also an opinion in the habeas corpus case. On the following day the court heard an application for an injunction in an important water case from San Diego County. No other cases being ready for hearing before the circuit court, he took the train on Tuesday, the 13th, at 1:30 o'clock in the afternoon, for San Francisco, where he was expected to hear a case then awaiting his arrival immediately upon his return, being accompanied on his return by Deputy Marshal Neagle. On the morning of the 14th, between the hours of seven and eight, the train arrived at Lathrop, in San Joaquin County, which is in the Northern Dis-

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trict of California, a station at which the train stopped for breakfast. Justice Field and the deputy marshal at once entered the dining-room, there to take their breakfast, and took their seats at the third table in the middle row of tables. Justice Field seated himself at the extreme end, on the side looking towards the door. The deputy marshal took the next seat on the left of the justice. What subsequently occurred is thus stated in the testimony of Justice Field:—

“A few minutes afterwards, Judge Terry and his wife came in. When Mrs. Terry saw me, which she did directly she got diagonally opposite me, she wheeled around suddenly, and went out in great haste. I afterwards understood, as you heard here, that she went for her satchel. Judge Terry walked past, opposite to me, and took his seat at the second table below. The only remark I made to Mr. Neagle was: ‘There is Judge Terry and his wife.’ He remarked: ‘I see him.’ Not another word was said. I commenced eating my breakfast. I saw Judge Terry take his seat. In a moment or two afterwards I looked round, and saw Judge Terry rise from his seat. I supposed at the time he was going out to meet his wife, as she had not returned, so I went on with my breakfast. It seems, however, that he came round back of me, I did not see him, and he struck me a violent blow in the face, followed instantaneously by another blow. Coming so immediately together, the two blows seemed like one assault. I heard, ‘Stop! stop!’ cried by Neagle. Of course, I was for a moment dazed by the blows. I turned my head round, and I saw that great form of Terry’s, with his arm raised, and his fists clinched to strike me. I felt that a terrific blow was coming, and his arm was descending in a curved way, as though to strike the side of my temple, when I heard Neagle cry out, ‘Stop! stop! I am an officer.’ Instantly two shots followed. I can only explain the second shot from the fact that he did not fall instantly. I did not get up from my seat, although it is proper for me to say that a friend of mine thinks that I did; but I did not. I looked around, and saw Terry on the floor. I looked at him, and saw that peculiar movement of the eyes that indicates the presence of death. Of course, it was a great shock to me. It is impos-

sible for any one to see a man in the full vigor of life, with all those faculties that constitute life, instantly extinguished, without being affected, and I was. I looked at him for a moment, then rose from my seat, went around, and looked at him again, and passed on. Great excitement followed. A gentleman came to me whom I did not know, but I think it was Mr. Lidgerwood, who has been examined as a witness in this case, and said: 'What is this?' I said: 'I am a justice of the supreme court of the United States. My name is Judge Field. Judge Terry threatened my life, and attacked me, and the deputy marshal has shot him.' The deputy marshal was perfectly cool and collected, and stated: 'I am a deputy marshal, and I have shot him to protect the life of Judge Field.' I cannot give you the exact words, but I give them to you as near as I can remember them. A few moments afterwards the deputy marshal said to me: 'Judge, I think you had better go to the car.' I said: 'Very well.' Then this gentleman, Mr. Lidgerwood, said: 'I think you had better;' and with the two I went to the car. I asked Mr. Lidgerwood to go back and get my hat and cane, which he did. The marshal went with me, remained for some time, and then left his seat in the car, and, as I thought, went back to the dining-room. (This is, however, I am told, a mistake, and that he only went to the end of the car.) He returned, and either he or some one else stated that there was great excitement; that Mrs. Terry was calling for some violent proceedings. I must say here that, dreadful as it is to take life, it was only a question of seconds whether my life or Judge Terry's life should be taken. I am firmly convinced that, had the marshal delayed two seconds, both he and myself would have been the victims of Terry."

In answer to a question whether he had a pistol or other weapon on the occasion of the homicide, Justice Field replied: "No, sir. I have never had on my person, or used, a weapon since I went on the bench of the supreme court of the state, on October 13, 1857, except once." That was on an occasion when he crossed the Sierra Nevada Mountains, in 1862. "With that exception, I have not had on my person, or used, a pistol or other deadly weapon."

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Mr. Neagle, in his testimony, stated that, before the train arrived at Fresno, he got up and went out on the platform, leaving the train, and there saw Judge Terry and his wife get on the cars; that when the train arrived at Merced he spoke to the conductor, Woodward, and informed him that he was a deputy United States marshal; that Judge Field was on the train, and also Judge Terry and his wife; and that he was apprehensive that when the train arrived at Lathrop there would be trouble between those parties, and inquired whether there was any officer at that station, and was informed, in reply, that there was a constable there; that he then requested the conductor to send word to the officer to be at Lathrop on the arrival of the train, and that he also applied to other parties to induce them to endeavor to secure assistance for him at that place, in case it should be needed. The deputy marshal further stated that, when the train arrived at Lathrop, Justice Field went into the dining-room, he accompanying the justice; that they took their seats at a table; that, shortly after they were seated, Judge Terry and his wife entered the dining-room, his wife following him several feet in the rear; that, when the wife reached a point nearly opposite Justice Field, she turned around, and went out rapidly from the room, and, as appeared from what afterwards followed, she went to the car to get her satchel. When she returned from the car, the satchel was taken from her, and it was found to contain a pistol—revolver—containing six chambers, all of which were loaded with ball. This pistol lay on the top of the other articles in the satchel. The witness further stated that Judge Terry passed down, opposite Justice Field, to a table below where they were sitting; that in a few minutes, while Justice Field was eating, Judge Terry rose from his seat, went around behind him—the justice not seeing him at the time—and struck him two blows, one on the side and the other on the back of the head; that the second blow followed the other immediately; that one was given with the right hand, and the other with the left; that Judge Terry then drew back his hand, with his fist clinched, apparently to give the justice a violent blow on the side of his head, when he (Neagle) sprang to his feet, calling out to Terry, “Stop!

stop! I am an officer;" that Terry bore at the time on his face an expression of intense hate and passion, the most malignant the witness had ever seen in his life, and that he had seen a great many men in his time in such situations, and that the expression meant life or death for one or the other; that as he cried out those words, "Stop! stop! I am an officer," he jumped between Terry and Justice Field, and at that moment Judge Terry appeared to recognize him, and instantly, with a growl, moved his right hand to his left breast, to the position where he usually carried his bowie-knife; that, as his hand got there, the deputy marshal raised his pistol, and shot twice in rapid succession, killing him almost instantly. He further stated that the position of Judge Field was such—his legs being at the time under the table, and he sitting—that it would have been impossible for him to have done anything, even if he had been armed; and that Judge Terry had a very furious expression, which was characterized by the witness as that of an infuriated giant. He also added that his cry to him to stop was so loud that it could be heard throughout the whole room, and that he believed that a delay in shooting of two seconds would have been fatal both to himself and Justice Field.

The facts thus stated in the testimony of Justice Field and the petitioner were corroborated by the testimony of all the witnesses to the transaction. The petitioner soon afterwards accompanied Justice Field to the car, and while in the car he was arrested by a constable, and at the station below Lathrop was taken by that officer from the car to Stockton, the county seat of San Joaquin County, where he was lodged in the county jail. Mr. Justice Field was obliged to continue on to San Francisco without the protection of any officer. On the evening of that day, Mrs. Terry, who did not see the transaction, but was at the time outside of the dining-room, made an affidavit that the killing of Judge Terry was murder, and charged Justice Field and Deputy Marshal Neagle with the commission of the crime. Upon this affidavit, a warrant was issued by a justice of the peace at Stockton against Neagle, and also against Justice Field. Subsequently, after the arrest of Justice Field, and after his being released by the United States

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circuit court on habeas corpus upon his own recognizance, the proceeding against him before the justice of the peace was dismissed, the governor of the state having written a letter to the attorney-general of the state, declaring that the proceeding, if persisted in, would be a burning disgrace to the state, and the attorney-general having advised the district attorney of San Joaquin County to dismiss it. There was no other testimony whatever before the justice of the peace, except the affidavit of Sarah Althea Terry, upon which the warrant was issued. (*Ante*, 200.)

In the suit of William Sharon against Mrs. Terry in the circuit court of the United States, it was adjudged that the alleged marriage contract between her and Sharon, produced by her, was a forgery, and it was held that she had attempted to support it by perjury and subornation of perjury. She had also made threats during the past year, and up to the time of the shooting of Judge Terry, that she would kill the circuit judge and Justice Field, and she repeated that threat up to the time she made her affidavit for the arrest of Justice Field and Neagle; and that she had made such threats was a notorious fact in Stockton and throughout the state. The petition was accordingly presented, on behalf of Neagle, to the circuit court of the United States, for a writ of habeas corpus in this case, alleging, among other things, that he was arrested and confined in prison for an act done by him in the performance of his duty, namely, the protection of Mr. Justice Field, and taken away from the further protection which he was ordered to give to him. The writ was issued, and upon its return the sheriff of San Joaquin County produced a copy of the warrant issued by the justice of the peace of that county, and of the affidavit of Sarah Althea Terry, upon which it was issued. A traverse to that return was then filed in this case, presenting various grounds why the petitioner should not be held, the most important of which were that an officer of the United States, specially charged with a particular duty, that of protecting one of the justices of the supreme court of the United States while engaged in the performance of his duty, could not, for an act constituting the very performance of that

duty, be taken from the further discharge of his duty, and imprisoned by the state authorities; and that when an officer of the United States, in the discharge of his duties, is charged with an offense consisting in the performance of those duties, and is sought to be arrested, and taken from the further performance of them, he can be brought before the tribunals of the nation of which he is an officer, and the fact there inquired into. The attorney-general of the state appeared with the district attorney of San Joaquin County, and contended that the offense of which the petitioner is charged could only be inquired into before the tribunals of the state. The question of the jurisdiction of the national tribunal to interfere in the matter was elaborately argued by counsel; the attorney-general of the state and Mr. Langhorne appearing with the district attorney of San Joaquin County on behalf of the state, and Mr. Carey, United States attorney, and Messrs. Herrin, Mesick, and Wilson appearing on behalf of the petitioner. The latter did not pretend that any person in this state, high or low, who committed a crime, might not be tried by the local authorities, if it were a crime against the state; but that when, in the performance of his duties, that alleged crime consisted in an act which is deemed a part of the performance of a duty devolved upon him by the laws of the United States, it was within the competency of the national tribunals to determine, in the first instance, whether that act was a duty devolving upon him, and, if it was a duty devolving upon him, the officer had committed no offense against the state, and was entitled to be discharged.

Mr. John T. Carey, United States Attorney, Mr. Richard S. Mesick, Mr. Samuel M. Wilson, Mr. Wm. F. Herrin, Mr. W. L. Dudley, Mr. C. L. Ackerman, Mr. J. C. Campbell, and Mr. H. C. McPike, for petitioner.

Mr. G. A. Johnson, Attorney-General, Mr. J. P. Langhorne, and Mr. Avery C. White, District Attorney, for respondent.

By the Court, SAWYER, Circuit Judge. The petitioner has sued out a writ of habeas corpus, returnable before the court, alleging that he is unlawfully deprived of his liberty and

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imprisoned by virtue of a warrant issued by a justice of the peace of San Joaquin County, in this state, charging him with a felonious homicide, while the act thus characterized was a lawful act performed in the discharge of his duties as an officer of the United States; and the first question presented is whether this court has jurisdiction to inquire into the truth of that allegation.

Upon the question of jurisdiction, section 751, Revised Statutes, provides that “the supreme court and the circuit and district courts shall have power to issue writs of habeas corpus;” and section 752 further provides that “the several justices and judges of the said courts, within their respective jurisdictions, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty.” There is no limit in these provisions to the jurisdiction of these courts and judges to inquire into the restraint of liberty of any person. But section 753 prescribes some limitations, among which is “that the writ shall not extend to a prisoner in jail, . . . unless he is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court thereof, or in custody in violation of the constitution, or of a law or treaty of the United States;” and this legislation, in the language of the chief justice, in *McCardle's Case*, 6 Wall. 325, 326, in commenting upon the same provisions in a prior act, “is of the most comprehensive character. It brings within the habeas corpus jurisdiction of every court, and of every judge, every possible case of privation of liberty, contrary to the national constitution, treaties, or laws. It is impossible to widen this jurisdiction.” And again, in *Ex parte Royall*, 117 U. S. 249, the supreme court says:—

“As the judicial power of the nation extends to all cases arising under the constitution, the laws, and treaties of the United States; as the privilege of the writ of habeas corpus cannot be suspended unless when in cases of rebellion or invasion the public safety may require it; and as Congress has power to pass all laws necessary and proper to carry into execution the powers vested by the constitution in the government of the United States, or in any department or officer thereof,—

no doubt can exist as to the power of Congress thus to enlarge the jurisdiction of the courts of the Union, and of their justices and judges. That the petitioner is held under the authority of a state cannot affect the question of the power or jurisdiction of the circuit court, to inquire into the cause of his commitment, and to discharge him if he be restrained of his liberty in violation of the constitution. The grand jurors who found the indictment, the court into which it was returned and by whose order he was arrested, and the officer who holds him in custody, are all, equally with individual citizens, under a duty, from the discharge of which the state could not release them, to respect and obey the supreme law of the land, 'anything in the constitution and laws of any state to the contrary notwithstanding,' and that equal power does not belong to the courts and judges of the several states; that they cannot, under any authority conferred by the states, discharge from custody persons held by authority of the courts of the United States, or of commissioners of such courts, or by officers of the general government acting under its laws, results from the supremacy of the constitution and laws of the United States. (*Ableman v. Booth*, 21 How. 506; *Tarble's Case*, 13 Wall. 397; *Robb v. Connolly*, 111 U. S. 624.) We are, therefore, of opinion that the circuit court has jurisdiction upon writ of habeas corpus to inquire into the cause of appellant's commitment, and to discharge him, if he be held in custody in violation of the constitution."

In the exercise of this jurisdiction there is no conflict between the authority of the state and of the United States. The state in such cases is subordinate, and the national government paramount. "The constitution and laws of the United States are the supreme law of the land, and to these every citizen of every state owes obedience, whether in his individual or official capacity." (*Siebold's Case*, 100 U. S. 392. See, also, *Tennessee v. Davis*, 100 U. S. 257, 258.) The exclusive authority of the state to determine whether an offense has been committed against the laws of the state is now earnestly pressed upon our attention. In *Siebold's Case*, 100 U. S. 394, the court says: "It seems to be often overlooked that a national constitution has been adopted in this country, establishing a real government

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therein, operating upon persons and territory and things; and which, moreover, is, or should be, as dear to every American citizen as his state government is. Whenever the true conception of the nature of this government is once conceded, no real difficulty will arise in the just interpretation of its powers. But if we allow ourselves to regard it as a hostile organization, opposed to the proper sovereignty and dignity of the state governments, we shall continue to be vexed with difficulties as to its jurisdiction and authority. No greater jealousy is required to be exercised towards this government in reference to the preservation of our liberties than is proper to be exercised towards the state governments. Its powers are limited in number, and clearly defined, and its action within the scope of those powers is restrained by a sufficiently rigid bill of rights for the protection of its citizens from oppression. The true interest of the people of this country requires that both the national and state governments shall be allowed, without jealous interference on either side, to exercise all the powers which respectively belong to them according to a fair and practical construction of the constitution. State rights and the rights of the United States should be equally respected. Both are essential to the preservation of our liberties and the perpetuity of our institutions. But, in endeavoring to vindicate the one, we should not allow our zeal to nullify or impair the other." (See *Tennessee v. Davis*, 100 U. S. 266, 267.)

This court, then, has jurisdiction to inquire upon this writ into the cause of the imprisonment of the petitioner, and if, upon such inquiry, he is found to be "in custody for an act done or omitted in pursuance of a law of the United States," then he is in custody in violation of the constitution and laws of the United States, and he is entitled to be discharged, no matter from whom or under what authority the process under which he is held may have issued, the constitution and laws of the United States made in pursuance thereof being the supreme law of the land.

The homicide in question, if an offense at all, is, it must be conceded, an offense under the laws of the state of California, and the state, only, can deal with it, *as such, or in that aspect*.

It is not claimed to be an offense under the laws of the United States. But if the killing of Terry by Neagle was an “act done in pursuance of a law of the United States,” within the powers of the national government, then it is *not*, and *it cannot* be, an offense against the laws of the state of California, no matter what the statute of the state may be, the laws of the United States being the supreme law of the land. A state law, which contravenes a valid law of the United States, is, in the nature of things, necessarily void—a nullity. It must give place to the “supreme law of the land.” In legal contemplation, there can no more be two valid laws, which are in conflict, operating upon the same subject-matter, at the same time, than, in physics, two bodies can occupy the same space at the same time. But, as we have seen by the authorities cited, it is the exclusive province of the judiciary of the United States, to ultimately and conclusively determine any question of right, civil or criminal, arising under the laws of the United States. It is, therefore, the prerogative of the national courts, to conclusively construe the national statutes, and determine whether the homicide in question was the result of an “act done in pursuance of a law of the United States,” and when that question has been determined in the affirmative, the petitioner must be discharged, and the state has nothing more to do with the matter. All we claim, is, the right to determine the question, was the homicide the result of “an act done in pursuance of a law of the United States?” and if so, discharge the petitioner. As incidental to, and involved in, that question, it is necessary to inquire, whether the act of the petitioner was performed under such circumstances as to justify it. If it was, then, he was in the line of his duty. If not, then, he acted outside his duty. We do not make the inquiry, at all, for the purpose of determining, whether the act was an offense, or justifiable under the statutes of the state. We do not assume to consider the case, in that aspect, at all. We simply determine, whether it was an act, performed in pursuance of a law of the United States. Nor do we act, in this matter, because we have the slightest doubt, as to the impartiality of the state courts, and their ability, and disposition, to, ultimately, do exact justice to

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the petitioner. We have not the slightest doubt, or apprehension in that particular; but there is a principle involved. The question, is, has the petitioner *a right* to have his acts adjudged, and, if found to have been performed in the strict line of his authority, and duty, a *further right*, to be protected, by that sovereignty, whose servant he is, and whose laws he was executing? If he has that right, then, there is no encroachment upon the state jurisdiction, and this court must, necessarily, entertain his petition, and determine his rights under it, and under the laws of the United States. It has no discretion. It cannot decline to hear him without an utter disregard of one of the most important duties imposed upon it by the constitution and laws of the United States. What the state tribunals might, or might not, do, in this particular instance, is not a matter for a moment's consideration.

The question, is, what are the rights of the petitioner, as to having his case heard, and disposed of, in the courts of the sovereignty, whose servant he is, and whose laws he was employed in executing. If he has a right to be heard in this court, then, we must hear him, willing, or unwilling. There is no alternative. Whether the writ should issue, in this case, was not a question of "expediency," and whether the petitioner shall be discharged, or remanded, is not a question of "policy," or "comity," as suggested in some quarters. It is a question of *personal right, and personal liberty*, arising under the constitution and laws of the United States, which the court cannot ignore. There is a class of cases, of which *Ex parte Royall* is an example, in which the court may exercise a discretion, as to the *time* of interference, but, in our opinion, this is not one of them. (*Ex parte Royall*, 117 U. S. 251.) But, if it rests in our discretion to discharge, or remand, the petitioner to the state courts, to be, there, first tried for an offense against the state, while we are satisfied that he is entitled to be discharged, to what useful end would he be sent back, since, upon being tried, and convicted, he would still be discharged by the national courts on habeas corpus, if the act should appear to them to have been performed in pursuance of a law of the United States? This would be, but to put the state to *great, useless*

expense, and subject the petitioner, if guilty of no offense, to unjust imprisonment, in violation of his legal rights, until his trial could be had, and his writ of habeas corpus afterwards, again, sued out, heard, and decided, when the result, in all probability, would, at last, be the same. Evidently, public justice demands, that the case should be “summarily” decided, now, as required by section 761 of the Revised Statutes. The court has no right to trifle with the petitioner’s constitutional rights by, unnecessarily, subjecting him to unjust imprisonment, great expense, and vexatious delays. In case of a remand and conviction, the national courts must hear and decide the case, at last. Far better for all concerned, that they should decide it, now, and, forever, end it. We have no desire to usurp a jurisdiction that does not belong to us. We have enough to do, in exercising the admitted jurisdiction conferred upon us, without seeking to enlarge it in the smallest particular; but we must perform our duty, as we understand it, be the consequences what they may.

The statutes of the United States also make ample provision for giving full effect to the jurisdiction of this court, in cases where the petitioner alleges, that he is restrained of his liberty, in violation of the constitution, or of a law of the United States, in section 766, which reads as follows, to wit: “Pending the proceedings or appeal in the cases mentioned in the three preceding sections, and until final judgment therein, and after final judgment, of discharge, any proceeding against the person so imprisoned or confined or restrained of his liberty, in any state court, or by or under the authority of any state, for any matter so heard and determined, or in process of being heard and determined, under such writ of habeas corpus, shall be deemed null and void.”

It is, therefore, only necessary, in order to dispose of the case, to inquire, and ascertain, whether the petitioner is in custody for an act done in pursuance of a law of the United States.

As we have seen from the statement of facts, Mr. Justice Field, of the United States supreme court, allotted to the ninth circuit, was traveling, officially, from one part of his circuit to another, in pursuance of the requirements of the statutes

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of the United States, for the purpose of holding a circuit court. By reason of threats against his life, made by dissatisfied litigants, generally, known, and published in the newspapers, and brought to the knowledge of the United States marshal for the Northern District of California, and by him called to the attention of the attorney-general of the United States, that officer directed the marshal to furnish the justice with protection, while thus engaged in the performance of his judicial duties, on the circuit. The marshal, deeming it proper, furnished the necessary protection, by assigning that duty to the petitioner, who was a United States deputy marshal. The claim, is, that the petitioner, as such deputy marshal, was affording the only protection practicable to Justice Field, in the lawful discharge of his duty, when the homicide was committed, and that the killing was necessary for the preservation of the lives of both Justice Field and himself, at the time the fatal shot was fired. The homicide was committed at Lathrop, and not upon land purchased by the United States with the consent of the state for the needful uses of the United States, in pursuance of article 1, section 8, of the Constitution. Conceding the points to be as stated, do they present a case of an act performed in pursuance of a law of the United States, subject to their jurisdiction and to the jurisdiction of this court, and is the petitioner held under an arrest on a charge of murder by the state, "in custody in violation of the constitution or laws of the United States," within the meaning of the statute?

It is urged, that, since the homicide was committed in the state at large, and not in the court-house, or upon land within the exclusive jurisdiction of the United States, the question, as to whether the homicide is murder, is a question arising, exclusively, under the laws of the state, and that it can be investigated, and determined by the state courts, alone. It is admitted on the part of the state, that the United States has exclusive jurisdiction over the custom-house block, and "over all places purchased by the consent of the legislature of the state, in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings," in pursuance of section 8, article 1, of the national Constitution, and

that the state has no jurisdiction, whatever, of any offense committed in such places. But it is contended, that the United States have no jurisdiction of offenses committed outside the lands so purchased, in other portions of the state, but that, in the state at large, the jurisdiction of the state is exclusive. This proposition, like most others urged by those, who insist on extreme state-rights doctrines, wholly ignores the principle that there can be no legal conflict, or inconsistency, in matters wherein the state is subordinate, and the United States are paramount—where the constitution and laws of the United States are the supreme law of the land. We have, already, seen, that, although in certain cases, the courts of the United States have jurisdiction to discharge on habeas corpus, prisoners held in custody by the state courts, in violation of the constitution and laws of the United States, yet, that, the state courts “cannot, under any authority conferred by the state, discharge from custody, persons held by authority of the courts of the United States, or of commissioners of such courts, or by officers of the general government, acting under such laws,” and that this “results from the supremacy of the constitution and laws of the United States.” This principle, established in the *Booth* and *Tarble Cases*, was recently properly recognized by the supreme court of California, when upon the return of the writ of habeas corpus in *Terry's Case*, it appearing that he was in custody by virtue of a judgment of the United States circuit court, it declined to require the sheriff to produce his body. As the powers and duties of the state and national courts are by no means reciprocal, in this class of cases, so, they are not reciprocal, in the matter of territorial jurisdiction mentioned, as claimed on the part of the state. The constitution and laws of the United States, as to those matters wherein they are supreme, extend over every foot of the territories of the United States, and the jurisdiction of its courts, to enforce rights derived thereunder, is as extensive, as the territory to which they are applicable.

In *Siebold's Case*, 100 U. S. 394, 395, the supreme court, in reply to an argument in favor of a wide extension of state rights, uses the following language, peculiarly applicable to the

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point now under consideration: "Somewhat akin to the argument which has been considered is the objection, that the deputy marshals authorized by the act of Congress to be created and to attend the elections are *authorized to keep the peace*; and that this is a duty which belongs to the state authorities alone. It is argued *that the preservation of peace and good order in society is not within the powers confided to the government of the United States, but belongs exclusively to the states*. Here, again, we are met with the theory that the government of the United States does not rest upon the soil and territory of the country. We think that this theory is founded on an entire misconception of the nature and powers of that government. We hold it to be an incontrovertible principle, that the government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it. This, necessarily, involves the power to command obedience to its laws, and hence the power to keep the peace to that extent. This power to enforce its laws, and to execute its functions in all places, does not derogate from the power of the state to execute its laws, at the same time, and in the same places. The one does not exclude the other, except where both cannot be executed at the same time. In that case the words of the constitution itself show which is to yield. 'This constitution, and all laws which shall be made in pursuance thereof, shall . . . be the supreme law of the land.'" And again: "The argument is based on a strained and impracticable view of the nature and powers of the national government. *It must execute its powers or it is no government. It must execute them on the land as well as on the sea, on things as well as on persons. And, to do this, it must necessarily have the power to command obedience, to preserve order, and keep the peace; and no person or power in this land has the right to resist or question its authority, so long as it keeps within the bounds of its jurisdiction.*" (100 U. S. 396.)

The power to keep the peace is a police power, and the United States have the power to keep the peace in matters affecting their sovereignty—the national peace. There can be no doubt, then, that the jurisdiction of the United States is not affected, by reason

of the place—the locality—where the homicide occurred. If the locality is a necessary element of jurisdiction, a majority of the offenses created by the statutes would be out of their jurisdiction, and the statutes creating such offenses would be nullities, and practically useless. For example, for a quarter of a century, the United States courts in this state were held in rented buildings owned by private parties. They had no jurisdiction over them under the provision of section 8, article 1, of the national Constitution; and no jurisdiction other than that had over other portions of the country to which the constitution and its laws extended. Had an assault been committed in open court, upon the judge, in one of these buildings, and the assailing party been slain by the marshal in protecting the judge, under circumstances excusing, or justifying the homicide, would it be pretended, that the court would have no jurisdiction to protect him from interference by the state government? Or, have the United States, and their courts, no jurisdiction over the offense of resisting a United States marshal in the lawful execution of the process of the courts? or over the crime of counterfeiting the coin, or forging the bonds, or other securities of the United States, or other offenses against the laws, unless the offense is committed in a place under the exclusive jurisdiction of the United States? Such a claim would be preposterous.

In the case of *Tennessee v. Davis*, *supra*, the defendant was indicted for murder in killing one Haynes, while he was engaged in discharging his duties as a deputy collector of internal revenue of the United States, and which killing Davis claimed was in self-defense. The case was removed to the circuit court of the United States, under section 643, Revised Statutes. It was contended, that this act was an encroachment upon state rights, since it took away the right of the state, to determine, and execute its own criminal laws; and was, therefore, unconstitutional. The supreme court sustained the act. It was held “that the United States is a government with authority extending over all the territory of the Union, acting upon the state, and the people of the state.” In deciding the case, the court said:—

“As was said in *Martin v. Hunter*, 1 Wheat. 363, the ‘general government must cease to exist whenever it loses the power

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of protecting itself in the exercise of its constitutional powers.' It can act only through its officers and agents, and they must act within the states. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a state court, for an alleged offense against the laws of the state, yet warranted by the federal authority they possess, and if the general government is powerless to interfere at once for their protection; if their protection must be left to the action of the state court,—the operations of the general government may at any time be arrested at the will of one of its members. The legislation of a state may be unfriendly. It may affix penalties to acts done under the immediate direction of the national government, and in obedience to its laws. It may deny the authority conferred by those laws. The state court may administer not only the laws of the state, but equally federal law, in such a manner as to paralyze the operations of the government. And even if, after trial and final judgment in the state court, a case can be brought into the United States court for review, *the officer is withdrawn from the discharge of his duty during the pendency of the prosecution, and the exercise of acknowledged federal power arrested.* We do not think such an element of weakness is to be found in the constitution. The United States is a government, with authority extending over the whole territory of the Union, acting upon the states and upon the people of the states. While it is limited in the number of its powers, so far as its *sovereignty* extends, it is supreme. No state government can exclude it from the exercise of any authority conferred upon it by the constitution, obstruct its authorized officers against its will, or withhold from it, for a moment, the cognizance of any subject which that instrument has committed to it." (*Tennessee v. Davis*, 100 U. S. 262, 263.)

These expositions of the territorial extent of the jurisdiction of the general government are authoritative, and conclusive; and the result, is, that wherever the constitution and laws of the United States operate, at all, the state laws in conflict with them are subordinate, and those of the United States are supreme, and paramount. Numerous cases are reported in the

books, wherein parties arrested for offenses under the state laws, for acts performed in the discharge of duties imposed by the laws of the United States, have been discharged from imprisonment on habeas corpus by the United States courts, in consonance with these principles, now, authoritatively, established by the supreme court of the United States, in the cases cited, and others in the same line. Thus, in *Ex parte Jenkins*, and others, deputy United States marshals, who were arrested on the warrant of a justice of the peace in Pennsylvania, for shooting and wounding a negro, who resisted an arrest attempted under a warrant issued by the United States court for a fugitive slave, Mr. Justice Grier of the United States circuit court, took jurisdiction and discharged the petitioners, under the act of 1835, since carried into the Revised Statutes, as part of section 753, under which this case arises. After their discharge, they were arrested again, in a suit by the negro for trespass, upon a warrant issued by a judge of the supreme court of Pennsylvania, and again discharged on habeas corpus by the United States circuit court. After this they were indicted for the shooting, and wounding of the negro, by the grand jury of Luzerne County, and a third time released on habeas corpus. (2 Wall. Jr. 521, et seq.) In the first of these cases Mr. Justice Grier, observes: "What, then, have we power to do on the return of the writ? The writ of habeas corpus is a high prerogative writ known to the common law, the great object of which is the liberation of those who may be in prison without sufficient cause. It is in the nature of a writ of error, to examine the legality of the commitment. It brings the body of the prisoner up, together with the cause of his commitment. The court can, undoubtedly, inquire into the sufficiency of that cause. . . . Warrants of arrest issued on the application of private informers, may show on their face a *prima facie* charge sufficient to give jurisdiction to the justice; but it may be founded on mistake, ignorance, malice, or perjury. To put a case very similar to the present—A tells B that he has seen C kill D. B runs off to a justice, swears to the murder boldly, without any knowledge of the facts, and takes out a warrant for C, who is arrested and imprisoned in consequence thereof. C prays a habeas corpus,

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and shows that he was the sheriff of the county, and hanged D in pursuance of a legal warrant. If a court could not discharge a prisoner in such a case because the warrant was regular on its face the writ of habeas corpus is of little use. The authority conferred on the judges of the United States by this act of Congress gives them all the power that any other court could exercise under the writ of habeas corpus, or gives them none at all. If under such a writ they may not discharge their officer, when imprisoned 'by any authority,' for an act done in pursuance of a law of the United States, it would be impossible to discover for what useful purpose the act was passed. Is the prisoner to be brought before them only that they may *acknowledge their utter impotence to protect him?*"

In *Ex parte Robinson*, 6 McLean, 355, Mr. Justice McLean held that "a writ of habeas corpus may issue to relieve an officer of the federal government who has been imprisoned under state authority for the performance of his duty." In the course of the decision the learned justice observes: "It is a general principle of law, to which I know of no exception, that the laws of every government shall be construed by itself; and such construction is acted upon by 'the judiciary of all other countries. By the federal constitution the judicial power of the United States is declared to be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish.' Under this provision the judiciary of the Union gives a construction to the laws which is obligatory on the state tribunals. The constitution again declares: 'The constitution, and laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.'" (6 McLean, 362.)

Thus, it is the exclusive prerogative of the national courts to, finally, determine, whether an act performed by one of the officers of the United States, and, especially, an officer of the court itself, is done in pursuance of a law of the United States, or whether, when under arrest for acts performed in connection

with his office, he is "in custody in violation of the constitution, or of a law of the United States."

In the case of *United States v. Jailer of Fayette County*, 2 Abb. U. S. 265, a special deputy United States marshal was arrested, under the state laws, on a charge of murder, for a homicide committed by him in attempting to arrest one, Cull, upon a warrant issued by a commissioner of the United States circuit court, for offenses charged to have been committed under the internal revenue laws. Upon the hearing, the United States circuit court found, that the homicide was committed in the performance of "an act done in pursuance of a law of the United States, or of a process of a court or judge of the same," and discharged the petitioner. The question of the jurisdiction of the court, and the facts, were, elaborately, discussed. So, in *Re Ramsey*, 2 Flip. 451, the prisoner was a deputy United States marshal, in custody by order of a state court, on a charge of murder, the homicide having been committed in an attempt to arrest, upon a warrant issued by the United States courts, the party slain. The court found that the act was done in pursuance of a law of the United States; that petitioner was justified in the act which he performed, and discharged him. (See, also, to the same effect, *In re Neill*, 8 Blatchf. 167; *In re Farrand*, 1 Abb. U. S. 140; *Case of Electoral College*, 1 Hughes, 571; *In re Hurst*, 2 Flip. 510; and cases collected in 29 Myers Fed. Dec. 678.) Thus, it appears to be settled, beyond controversy, that, where a party is in custody by state authority, for an act done, or omitted to be done, in pursuance of any specific provision of a statute of the United States, imposing a duty upon him, or for an act performed justifiable by the circumstances of the case, in order to enable him to perform that duty, or in the execution of any order, or process, or decree, of a court of the United States, or of a judge thereof, the courts of the United States have jurisdiction to discharge him on habeas corpus, under section 753 of the Revised Statutes. In such a case, the laws of the United States are supreme, and the act cannot be an offense against the laws of the state, and, as we have before seen, whether an act is performed in pursuance of a law of the United States, is a question exclusively for the United

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States courts to, authoritatively, and, conclusively, determine. They must interpret finally the laws of the United States. With their decision the state cannot interfere. When the United States courts have spoken on the subject, the state has nothing more to do with it.

The only remaining questions to determine are: (1) Was the homicide, now in question, committed by petitioner, while acting in discharge of a duty imposed upon him by the constitution, or laws of the United States, within the meaning of section 753 of the Revised Statutes? (2) Was the homicide necessary, or was it reasonably apparent to the mind of the petitioner, at the time, and under the circumstances then existing, that the killing was necessary in order to a full and complete discharge of such duty?

It is urged that there is no statute, which, specifically, makes it the duty of a marshal, or a deputy marshal, to protect the judges of the United States courts, while out of the court-room, traveling from one point to another in the circuit, on official business, from the violence of litigants, who have become offended at adverse decisions made by such judges in the performance of their judicial duties, and that marshals, or deputies, so engaged, are not within the provisions of section 753 of the Revised Statutes. It will be observed, that the language of the provision of section 753, is, "an act done . . . in pursuance of a *law* of the United States," not in pursuance of a *statute* of the United States.

The statutes of Congress, in their express provisions, do not present all the law of the United States. Their incidents and implications are as much a part of the law as their express provisions. When they prescribe duties, provide for the accomplishment of certain designated objects, or confer authority in general terms, they carry with them all the powers essential to effect the ends designed.

Says the supreme court in *Tennessee v. Davis*, 100 U. S. 264, quoting with approbation from Chief Justice Marshall: "It is not unusual for a legislative act to involve consequences which are not expressed. An officer, for example, is ordered to arrest an individual. It is not necessary, nor is it usual, to

say that he shall not be punished for obeying this order. His security is implied in the order itself. It is no unusual thing for an act of Congress to imply, without expressing, this very exemption from state control. . . . The collectors of the revenue, the carriers of the mail, the mint establishment, and all those institutions which are public in their nature, are examples in point. *It has never been doubted that all who are employed in them are protected while in the line of their duty; and yet this protection is not expressed in any act of Congress.* It is incidental to, and is implied, in the several acts by which those institutions are created; and is secured to the individuals employed in them by the judicial power alone; that is, the judicial power is the instrument employed by the government in administering this security."

If the officers referred to in the preceding passage are to be protected, while in the line of their duty, without any special law, or statute, requiring such protection, are not the judges of the courts—the principal officers in a department of the government second to no other—also to be protected, and are not their executive subordinates—the marshals, and their deputies—to be shielded from harm by the national laws, while honestly engaged in protecting the heads of the courts from assassination? When it was argued in *Siebold's Case*, that, it was not in the power of the United States to authorize the United States marshals to "*keep the peace*" at congressional elections, "*that the preservation of peace and good order in society is not within the powers confided to the government of the United States, but belonged exclusively to the state,*" we have seen the answer of the supreme court to that argument, in cases where the rights and interests of the *United States government were involved in the matter of keeping the peace.* "We hold it to be an incontrovertible principle," said the court, "that the government of the United States, may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it. This, necessarily, involves the power to command obedience to its laws, and hence the power to keep the peace to that extent." And again: "Why do we have marshals at all if they cannot physic-

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ally lay their hands on persons and things in the performance of their proper duties? What functions can they perform, if they cannot use force? In executing the processes of the courts, must they call upon the nearest constable for protection? Must they rely upon him to use the requisite compulsion, and to keep the peace whilst they are soliciting and entreating the parties and by-standers to allow the law to take its course? This is the necessary consequence of the positions that are assumed. If we indulge in such impracticable views as these, and keep on refining and re-refining, we shall drive the national government out of the United States, and relegate it to the District of Columbia, or perhaps some foreign soil. We shall bring it back to a condition of greater helplessness than that of the old confederation.” (*Siebold’s Case*, 100 U. S. 395, 396.)

In this particular case, the petitioner, long before he reached Lathrop, endeavored, through the conductor of the train, and the proprietor of the eating-house, at that place, to have a *constable* in readiness, on the arrival of the train, *to keep the peace*, but without success. When too late to prevent the tragedy, the constable appeared, and arrested the petitioner, for performing the duty, which it is, now claimed, devolved, exclusively, upon himself, or some other peace officer of the state. Had the United States, in this instance, relied upon another government—the state of California—to keep the peace, as to one of their most venerable and distinguished officers—one of the judges of their highest court—in relation to matters concerning the performance of his official duties, they would have leaned upon a broken reed; and there would, now, in all probability, be a vacancy on the bench of one of the most august judicial tribunals in the world, and the deceased—the would-be assassin—might, perhaps, be a tenant of the Stockton jail, to be disposed of by another government. The case affords a striking illustration of the necessity for the United States to protect their own officers, while in the discharge of their duties, and, by such protection, protect the nation itself. The result was, that, instead of arresting the conspirator in the contemplated murder—the wife of the deceased, armed with a loaded revolver, till relieved of it by a citizen—threatening death to

Justice Field, calling upon the by-standers to aid her, and attempting to enter the car, with the avowed purpose of compassing his death, the officer of the United States, assigned by his government to the special duty of protecting the justice's life against these very parties, while in the actual performance of the duties, so assigned him, was, himself, arrested, without warrant, and disarmed by an inferior officer of the state, and interrupted in the discharge of those momentous duties, thereby, leaving his charge helpless, and without the protection provided by the government he was serving, at a time when such protection seemed most needed. Had Neagle been a deputy sheriff of San Joaquin County, assigned, by his superior, to this very duty of protecting the life of Justice Field, under the state laws, and, in the performance of his duties, committed the homicide in all other respects under precisely the same circumstances, would he have been arrested by the constable of Lathrop, without a warrant, and disarmed with such inconsiderate haste, and, thereby, prevented from further performing his duty to protect the life and person of Justice Field, leaving him to pursue the remainder of his journey without protection? Yet the constable was informed, that Neagle was acting as a deputy United States marshal, under the orders of his superiors, for the protection of the life and person of a justice of the supreme court of the United States.

We do not wish to be regarded as, now, calmly, and deliberately, looking back upon the scene, and sitting in judgment upon the action of the constable, or as passing censure upon his zeal. He, doubtless, in the emergency, where time for consideration was short, and the facts not fully appreciated, acted according to the best dictates of his judgment, necessarily, hastily formed. But when the state now comes in, after an arrest upon a warrant issued upon such flimsy testimony as that presented, and, deliberately, claims the exclusive right to sit in judgment upon the acts of the United States deputy marshal, performed not upon his own interpretation of the law, but upon that of the attorney-general of the United States, who may be presumed to possess some knowledge of his powers and duties, it is well to consider the circumstances from a stand-

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point presenting a view of both sides of the question. In matters of the public peace, in which the national government is concerned, the marshals and deputy marshals, within the scope of their authority, are *national peace officers*, with all the statutory and common-law powers appertaining to peace officers. Is not the national public peace involved, when a deadly assault is, unexpectedly, made upon a judge in open court, in which the marshal, and his deputies, seeing the assault, are both authorized, and bound, on their own motion, without any previous order or command, to interpose, and use sufficient force to quell the disturbance, and subdue the parties making it? Yet where is there any specific provision of the statute imposing that duty upon them? The marshal is required to attend court, but it is not provided what he shall do in court. To what end shall he be in court, if not to keep order, and, if necessary, to protect the judges from violence, by force, or any practicable means? But there is no statute requiring it in terms. The general duties of marshals are provided for in section 787, which reads as follows: "It shall be the duty of the marshal of each district to attend the district and circuit courts when sitting therein, and execute throughout the district, all lawful precepts directed to him, and issued under the authority of the United States; and he shall have power to command all necessary assistance in the execution of his duty."

There is no more authority specifically conferred upon the marshal by this section to protect the judge from assassination, in open court, without a specific order or command, than there is to protect him out of court, when on the way from one court to another, in the discharge of his official duties. And the assassination in court, as well as out of it, might well be accomplished before the judge would be aware of his danger, and before it would be possible to give a command or order to the marshal for his protection. The authority exists in the one case, as in the other, from the nature of the office, and the powers arising under the common law, recognized and in use in the country, and in the nature of things, inherent in the office. The very idea of a government composed of executive, legislative, and judicial departments, necessarily, comprehends,

the power to do all things through its appropriate officers and agents, within the scope of its general governmental purposes and powers, requisite to preserve its existence, protect it, and its ministers, and give it complete efficiency in all its parts. It necessarily and inherently includes power in its executive department to enforce the laws, keep the national peace with regard to its officers while in the line of their duty, and protect by its all-powerful arm all the other departments, and the officers, and instrumentalities necessary to their efficiency, while engaged in the discharge of their duties. In language attributed to Mr. ex-Secretary Bayard, used with reference to this very case, which we quote, not as a controlling, judicial authority, but for its intrinsic, sound, common sense: "The robust and essential principle must be recognized and proclaimed, that the inherent powers of every government which is sufficient to authorize and enforce the judgment of its courts, are, equally, and at all times, and in all places, sufficient to protect the individual judge, who fearlessly and conscientiously in the discharge of his duty, pronounces those judgments."

Our jurisprudence is derived from, and founded upon, that of England, and our judges and officers are substantially the same. They have corresponding duties imposed upon them, and inherently possess corresponding executive powers, to enable them to effectively perform their duties. From the foundation of our government, many of their common-law duties have been performed, and common-law powers exercised without specific or statutory direction, and without question; and the common-law principles governing them, except so far as inapplicable, or modified by statute, still remain in force. The observation of the supreme court of California, in the *Estate of Apple*, 66 Cal. 434, in which state a code has been adopted with respect to the common law not abrogated or modified by the code, is applicable here. Said the court: "The code establishes the law of this state respecting the subjects to which it relates; but this, of course, does not mean that there is no law with respect to such subjects except that embodied in the code. When the code speaks, its provisions are controlling, and they are to be liberally construed, with a view to effect its objects and promote jus-

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tice, the rule of the common law that statutes in derogation thereof are to be strictly construed having been abolished here; but where the code is silent, the common law governs.”

So here, where the duties of the marshal are not limited, or specifically defined, by the statute, we must look to the powers and duties of sheriffs at common law for them, so far as those duties come within the purposes, and powers of the national government. There are many acts, and duties, daily performed by the marshals, and by other officers, that are not specifically pointed out, or defined by the statute. The marshals are in daily attendance upon the judges, and performing official duties in their chambers. Yet no statute, specifically, points out those duties, or requires their performance. Indeed, no such places as chambers for the circuit judges, or circuit justices, are mentioned at all in the statutes. The judges’ chambers do not appear to have any “local habitation.” The justices of the supreme court at Washington have, in fact, no chambers, otherwise, than, as they study, and do their work out of court, at a room in their own residences. We have in the San Francisco court-house rooms that we call chambers, in which the work of the judges out of court is, in part, but not wholly, performed. We apprehend that the marshal would as clearly be authorized to protect the judges here, in chambers, as in the court-room. All business done out of court by the judge is called “chamber business.” But it is not necessary to be done in what is usually called “chambers.” Chamber business may be done, and often is done, on the street, in the judge’s own house, at the hotel where he stops, when absent from home, or it may be done *in transitu*, on the cars, in going from one place to another, within the proper jurisdiction to hold court. Mr. Justice Field could, as well, and as authoritatively, issue a temporary injunction, grant a writ of habeas corpus, an order to show cause, or do any other chamber business for the district in the dining-room at Lathrop, or in the cars, as at his chambers in San Francisco, or in the court-room. He could have made a writ of habeas corpus returnable before himself on the car, and lawfully heard and decided the case while on his passage to San Francisco. The chambers of the judge, where chambers are

provided, are not an element of jurisdiction, but are a convenience to the judge, and to suitors—places, where the judge at proper times can be readily found, and the business conveniently transacted. But the chambers of the judge, as a legal entity, are something of a myth. For the purposes of jurisdiction, the chambers of the judge are wherever he happens to be in his circuit or district, when the exigencies of the case call for the transaction of chamber business, and a judge is as clearly engaged in the discharge of the duties of his office, when going from one place of holding court to another, for the purpose of holding court, and just as much entitled to protection from his own government against murderous or other assaults, from desperate suitors, on account of his judicial action, as when actually engaged in business at chambers, or in holding court.

In England, whence we derive our jurisprudence, the high sheriff of the shire was the keeper of the king's peace; that is to say, the keeper of the peace of the sovereignty which the king represents. So here, we take it, under the authorities cited, the marshal is the keeper of the peace of the government of the sovereignty he serves, within the scope of the supreme powers of that government. In England, in early days, it was the duty in every shire of the sheriffs not only to attend the courts, but to attend the judges through their circuits. They met the judges at the border of the shire, and attended them until they left it at the border of another. (Dalt. Sher. ch. 98, p. 369 [published in 1682]. See, also, 40 Alb. L. J. 161.) Such is, also, understood to have been the practice in early days in a number of the states. From the advancing state of civilization, this practice has, doubtless, generally become unnecessary for the safety of the judges, and it has fallen into desuetude. But it does not follow, that the power to thus protect them has been abolished, or become extinguished. It simply remains latent, or dormant, ready to be called into action, whenever the exigencies of the case, or times, require it. And how could there possibly be a more urgent occasion for reviving the practice, and calling it into action, than the recent journey of Justice Field to Los Angeles and return, on official business?

Upon general, immutable principles, the power must, neces-

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sarily, be inherent in the executive department of any government worthy the name of government, to protect itself in all matters to which its authority extends, and this, necessarily, involves the power to protect all the agencies and instrumentalities necessary to accomplish the objects and purposes of that government. In the national government of the United States, the judiciary constitutes one of its most important branches. Unlike the judiciary of other nations, it is invested with the jurisdiction to pass, finally, and, conclusively, upon the powers of the legislative and executive departments of the government, and to confine them within their constitutional limits. It is, therefore, the balance-wheel of the national government, that keeps it running, regularly, and smoothly, within its proper domain. Impotent, indeed, must be the executive branch of the government, if it is not empowered to protect the lives of the judges of the highest branch of its judiciary, from assault and assassination, on account of their judicial decisions, by desperate, disappointed litigants, while passing from point to point within their territorial jurisdiction, in the discharge of their high functions and duties. We cannot think the power can be wanting, even if there were no constitutional, or statutory provision, governing the case. It seems impossible, that the national government should be left to the mercy, good will, or complacency of the state to afford that protection to its judges that the United States, if worthy to be called a nation, are bound themselves to furnish.

As a further example of laws, not ordained by specific statutory enactments, see those respecting punishment for contempts. For forty years after the organization of the national government, down to 1831, there was no statute which, specifically, defined contempts of court. (*Ex parte Robinson*, 19 Wall. 510; *Ex parte Terry*, 128 U. S. 302, 303; *Ex parte Savin*, 131 U. S. 275.) But the courts, nevertheless, exercised the power, necessarily, from the nature of things inherent in every court, to protect itself, its dignity, and its officers, by the punishment of many acts as contempts of their authority; and they determined for themselves, what acts should constitute contempts. The first specific act upon the subject passed by Congress was

not an act enlarging the power of the court, but it was, on the contrary, a restriction of the powers already exercised within certain defined limits. The act was passed at the instance of Senator Buchanan, to limit the power of the courts, theretofore exercised, to punish for contempts, as a sequel to the impeachment of a United States judge for the district of Missouri. The act was passed March 2, 1831, and is entitled, "An act declaratory of the law concerning contempts of court." (4 U. S. Stats. at Large, 487.) The first section does not *grant* the power to punish for contempts, but expressly recognizes the existing power, and, in express terms, thereafter, limits the power to certain enumerated cases. In order that those who were before subject to punishment for contempt should not escape the penalties due their acts, section 2 of the statute makes certain acts, before punishable as contempts, offenses against the laws of the United States, punishable by the less summary, and more deliberate proceeding on indictment and trial by a jury. Many of the acts under that act, still recognized as punishable as contempts, as being necessary to the prompt and summary vindication of the authority of the court, are, also, indictable offenses under other statutes. In *Ex parte Robinson*, 19 Wall. 510, the court expresses a doubt, as to the power of Congress to thus limit the authority of the supreme court to punish for contempts, which derives its jurisdiction directly from the constitution. Yet, there is no express provision in the constitution conferring jurisdiction to punish contempts. It is treated as a power necessarily inherent in the court, requiring no express authority.

This statute of 1831 has been carried into the Revised Statutes, section 1 of that act having been re-enacted in section 725 of the Revised Statutes, giving it a granting, as well as a restricting form, but in no sense changing its purpose or meaning. And section 2 is now found in section 5399 of the Revised Statutes, as a part of the Criminal Code of the nation. Did anybody ever doubt, or does anybody now doubt, that the power of the United States courts to punish contempts, without any statutory definition of contempt, from the organization of the government down to 1831, was just as ample, and that it was just

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as much a part of the law of the United States, inherently, vested in the courts, as it was after the passage of the act of 1831, or as it is now under the same provisions carried into the Revised Statutes? Or did anybody doubt the authority of the courts to determine what acts constituted a contempt? Yet there was no specific provision of the statutes defining contempts. It was a power, however, necessarily, inherent in the courts. It is involved in the very idea of a court, having power to administer the laws of the land. It would be impossible for courts to perform their functions and administer the laws without it. And as so inherent, the power to punish various acts not mentioned as such, for contempt, was as much a part of the law of the United States as if ordained by a specific provision of the statute of the United States, and the authority of the marshal to protect the judges is a cognate power, also, necessarily, inherent in the office he holds. Thus there is much law of the United States not now found, in terms, in the statutes, but as valid and binding upon the people, and upon the states, as if it were, specifically, and, definitely, therein expressed. (See *United States v. Hudson*, 7 Cranch, 32-34; *In re Meador*, 1 Abb. U. S. 324; *In re Buckley*, 69 Cal. 18.)

But we are not without constitutional and statutory provisions, broad enough, and, specific enough, as we think, to cover the case. The national constitution, providing a government for sixty-five millions of people, covers but a very few pages, but it seems to be amply sufficient for the purposes intended. Article 2, section 1, of the national Constitution provides that, "the executive power shall be vested in a President of the United States of America." In prescribing the duties of the President, in the terse but comprehensive language of section 3, article 2, it provides that "he shall take care that the laws be faithfully executed." These provisions make him the executive head of the nation, and give him all the authority necessary to accomplish the purposes intended—all the authority, necessarily, inherent in the office, not otherwise limited. Congress, in pursuance of powers vested in it, has provided for seven departments, as subordinate to the President, to aid him in performing the executive functions conferred upon him.

Section 346 of the Revised Statutes provides that “one of the executive departments shall be known as the ‘Department of Justice,’” and that there shall be “an attorney-general, who shall be the head thereof.” He has general supervision of the executive branch of the national judiciary, and section 362 provides, as a portion of his powers and duties, that “the attorney-general shall exercise general superintendence, and direction over the attorneys and marshals of all the districts of the United States, and territories, as to the manner of discharging their respective duties; and the several district attorneys and marshals are required to report to the attorney-general an account of their official proceedings, and of the state and condition of their respective offices, in such time and manner as the attorney-general may direct.” Section 788 of the Revised Statutes provides that “the marshals and their deputies *shall have, in each state, the same powers in executing the laws of the United States, as the sheriffs and their deputies in such state may have, by law, in executing the laws thereof.*” By section 817 of the Penal Code of this state the sheriff is a *peace officer*. By section 4176 of the Political Code, he is *to preserve the peace, and prevent and suppress breaches of the peace*. The marshal is, therefore, in accordance with the decision of the supreme court already referred to, and under the provisions of the statute above cited, “*a peace officer,*” so far as keeping the peace in any matter wherein the national powers of the United States are concerned, and as to such matters he has all the powers of the sheriff, as a peace officer under the laws of the state. He is, in such matters, “*to preserve the peace,*” and “*prevent and suppress breaches of the peace.*” An assault upon, or an assassination of, a judge of the United States court, while engaged in any matter pertaining to his official duties, on account, or by reason of his judicial decisions, or action in performing his official duties, is a *breach of the peace, affecting the authority and interests of the United States, and within the jurisdiction and power of the marshal, or his deputies, to prevent as a peace officer of the national government*. Such an assault is not merely an assault upon the person of the judge, as a man. It is an assault upon the national judiciary, which he represents, and, through it, an assault upon the author-

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ity of the nation itself. *It is, necessarily, a breach of the national peace.* As a national peace officer, under the conditions indicated, it is the duty of the marshal, and his deputies, to prevent a breach of the national peace by an assault upon the authority of the United States, in the person of a judge of its highest court, while in the discharge of his duty. If this be not so, in the language of the supreme court, before cited, “why do we have marshals, at all?” What useful functions can they perform in the economy of the national government?

The constitution of the United States provides for a supreme court, with jurisdiction more extensive, in some particulars, than that conferred on any other national, judicial tribunal. If the executive department of the government cannot protect one of these judges, while in the discharge of his duty, from assassination, by dissatisfied suitors, on account of his judicial action, then it cannot protect any of them, and all the members of the court may be killed, and the court itself exterminated, and the laws of the nation, by reason thereof, remain unadministered and unexecuted. The power and duty imposed on the President to “take care that the laws are faithfully executed,” necessarily, carries with it all power and authority necessary to accomplish the object sought to be attained, and, certainly, the power and duty to protect from the deadly assaults of desperate suitors, the lives of the judges of the highest court in the nation, while engaged in the lawful discharge of their duties.

As we have before seen, neither constitution nor statutes can, or do, anticipate and point out, specifically, every possible right or duty to be covered and secured. They must, necessarily, be general. In the passage already cited from *Tennessee v. Davis*, 100 U. S. 265, the supreme court, in speaking of certain officers, says: “It has never been doubted, that all who are employed in them are protected while in the line of their duty; *and yet this protection is not expressed in any act of Congress. It is incidental to, and is implied in, the several acts by which those institutions are created*; and is secured to the individuals employed in them by the judicial power alone; that is, the judicial power is the instrument employed by the government in administering this security.” And in *United States v. Macdaniel*, 7 Peters,

14, similar views were expressed. Said the court: "A practical knowledge of the action of any one of the great departments of the government must convince every person that the head of a department, in the distribution of its duties and responsibilities, is often compelled to exercise his discretion. He is limited in the exercise of his powers by law; but it does not follow that he *must show a statutory provision for everything he does. No government could be administered on such principles. . . . There are numberless things which must be done, that can neither be anticipated nor defined, and which are essential to the proper action of the government.*"

These observations are especially and forcibly applicable to the terse but very comprehensive provisions of the constitution, and of the several statutes cited, as to the powers and duties of the President, the attorney-general, and marshals.

The act of the attorney-general, in directing the United States marshal to protect the life of Mr. Justice Field against the assaults of the deceased, and his wife, is, in legal contemplation, the act of the President. The President speaks, and acts, through the heads of the several executive departments in relation to subjects, which appertain to their respective duties. They are but the subordinates of the President, wielding his power. (*Wilcox v. Jackson*, 13 Peters, 513; *United States v. Cutter*, 2 Curt. 617.) In the former case, relating to a reservation of land by the secretary of war, the court said: "Now, although the immediate agent in requiring this reservation was the secretary of war, yet we feel justified in presuming that it was done by the approbation and direction of the President. The President speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties." (See, also, 7 Opinion Att'y-Gen. 453-479, 480, 481; *Confiscation Cases*, 20 Wall. 108, 109; *United States v. Eliason*, 16 Peters, 291.)

By section 788, Revised Statutes, and the several provisions of the statutes of California herein cited, the United States marshal is made a peace officer, and, as such, he is authorized to preserve the peace, so far as a breach of the peace affects the authority of the United States, and obstructs the operations of

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the government, and its various departments. The courts must, from the nature of things, be enabled fully to perform all their functions, imposed upon them by the constitution and laws, without hindrance or obstruction, and they must have the inherent power to protect themselves by, and through, their executive officers, under the direction and supervision of the attorney-general, and the President, against obstruction, and hindrance in the performance of their judicial duties. An assault upon a judge in court, or a judge out of court, while in the performance of his duty, induced by his judicial action, and *intended, or calculated to obstruct him in, or deter him from, a free and full discharge of his duty, is a breach of the national peace affecting the sovereignty of the nation, and tending to obstruct and impair the operations and efficiency of one of the most important departments of the government.* As such, it is the duty of the United States marshal, under the police powers of the nation, so conferred upon him, by the statutes cited, and as a national peace officer, to prevent such breach of the peace. Under the state laws deputy sheriffs, when occasion requires, constables, and police officers of cities, are assigned to certain districts, to watch over the safety of the citizens, and to guard, and protect their persons and property from assault, destruction, or injury, *in short, to prevent the commission of crimes, etc.* These officers, in cities, are found everywhere, night and day, guarding the citizen and his property from injury. So the attorney-general, under the provisions of the statute cited, and the President, under the provisions of the constitution, requiring him to see that the laws are faithfully executed, are authorized, and empowered, to direct the assignment by the marshal, of any deputy to perform any special, national police duty, within his jurisdiction, arising out of the statutes, whether by express provision, or necessary implication, and under any power, necessarily, inherent in the President, and government, in order to give full effect and efficiency to the government, or any of its departments. It has never, so far as we are advised, been doubted, that a marshal, or deputy marshal, is authorized to protect a judge, and preserve order, in open court, even by the use of force, without any special order, or command, as a part of the

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duties necessarily inherent in his office; yet, as we have already seen, there is no more specific statutory authority for so preserving order, and protecting the judge, in court, than for performing the same duty, under proper conditions for a judge engaged in performing his duties, of whatever nature, out of court.

It is argued by one of the counsel on behalf of the state, that these matters pertain, exclusively, to the peace of the state, and that the state has, not only, power to preserve the public peace, but that it is amply capable of performing this service; that it is its duty to do it; that the threats of the deceased were matters of public notoriety; and, that, by calling the powers of the state into action, Justice Field's life might have been protected by the state, and there would have been no necessity, whatever, for what is called on the part of the state, the illegal action of the United States marshal. It may be conceded, and it is undoubtedly true, that it was an imperative duty of the state to preserve the public peace, and to amply protect the life of Mr. Justice Field, *but it did not do it*. Where would Mr. Justice Field have been to-day had he relied, solely, upon the state to perform her conceded imperative duty? Not having performed that obligation, while on his journey in discharge of his judicial duties, does a complaint now come with a good grace from the state, against the United States for performing it for her, as well as for the national government, by protecting one of their most distinguished judicial functionaries, through one of their own officers, in the only manner in which it could have been, effectively, performed?

In the present case, and on this official journey, there was a necessity for the kind of protection afforded Mr. Justice Field, for no other kind would have been adequate. The occasion required a preventive remedy. The use of the state police force would have been impracticable, as the powers of the sheriff would have ended at the borders of his county, and of other township and city peace officers, at the boundaries of their respective townships and cities. Only a United States marshal, or his deputy, could exercise these official functions throughout the United States judicial district, and as we have seen, the powers exercised concern matters affecting the peace of the national govern-

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ment, and if the national government has no authority to act in the premises, it, certainly, ought to have such power. The only remedy suggested, on the part of the state, was, to arrest the deceased, and hold him to bail to keep the peace under section 706 of the Penal Code, the highest limit of the amount of bail being five thousand dollars. But, although the threats are conceded to have been publicly known, in the state, no state officer took any means to provide this flimsy safeguard.

Perhaps counsel intended to intimate that it was not the duty of the state, but of Mr. Justice Field himself, to set in motion proceedings under the law furnished by the state, to put the decedent under bonds to keep the peace. Has it come to this, then, that a justice of the supreme court of the United States, when, in obedience to the behests of the law, he comes to California to perform his judicial duties, must submit to the humiliation of immediately, upon his arrival, stealing away to some justice of the peace, and instituting proceedings to bind over to keep the peace, vindictive and dangerous litigants who have threatened his life? But what security to Mr. Justice Field would a bond of five thousand dollars afford against resolute, violent, and desperate parties, for whom the penalties for murder have no deterring power? The United States marshal, the United States attorney for the district of California, the attorney-general of the United States at Washington, and the mass of the people of California thought that the exigencies of the occasion required something more, and the result fully justified their view of the matter. Although no adequate means of protection were afforded by the state on his late official journey, and Mr. Justice Field would, in all probability, not now be among the living had not the petitioner, by the wise forethought of the attorney-general, been detailed to protect his life, yet the fact of the failure of the state to perform its duty does not afford any reason for taking the petitioner out of the custody of the state, unless, in committing the homicide, he was engaged in the performance of "an act done . . . in pursuance of a law of the United States," and the killing was justifiable. The failure to perform its duty would not alone oust the jurisdiction of the state, if it be exclusive. But since the pos-

sible remedy mentioned under the state law was alluded to by counsel, as ample, we refer to it, as illustrating the necessity for a speedy amendment of the laws of the United States, if they are now so defective as to afford no protection to the United States judges in the performance of their high functions. It is apparent to us, if he is not now so protected, that the distinguished justice allotted to the ninth circuit, and also his associates, should have thrown over them the protecting ægis of the laws of that government, which he has so long, faithfully, and efficiently served.

After mature consideration, we have reached the conclusion, that the homicide in question was committed by petitioner, while acting in the discharge of a duty imposed upon him by the constitution and laws of the United States, within the meaning of the provisions of section 753 of the Revised Statutes.

It only remains to inquire, secondly, was the homicide necessary, or was it reasonably apparent to the mind of the petitioner, at the time and under the circumstances, then existing, that the killing was necessary, in order to a full and complete discharge of such duty? The answer to this proposition is, really, included in the answer to the last, but we desire to make some observation bearing, especially, upon it. The attorney-general and counsel for the state declined to discuss the question, as to whether the homicide was justifiable, because, in their view, this is a question solely for the state court, the case, as claimed by them, not being within the provisions of section 753 of the Revised Statutes, and, therefore, not within the jurisdiction of this court. Holding, as we do, that the case falls within those provisions, so far as the petitioner was authorized to act, by the constitution and laws of the United States, it becomes necessary to determine whether the homicide was justifiable. For, if it was malicious, wanton, or reckless, without any reasonably apparent necessity, in order to fully and properly perform his duty of protecting Justice Field, then, it was an act performed beyond, and outside his duty, and he is amenable to the state courts. The facts set forth in the petition, and in the traverse to the return of the sheriff, are fully and satisfactorily proved by the testimony, and whether we determine the case upon demurrer to the traverse, or upon the whole case,

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as presented in the record, and evidence the result must be the same. Were the question of justification to be determined by the laws of the state of California, or in the state court, there could be no ground for doubt. Says the Penal Code: "Homicide is also *justifiable* when committed by any person when resisting any attempt to murder any person, or to do some great bodily injury upon any person." (Sec. 197, Pen. Code.) But we shall consider the question without reference to the statute of California.

It is unnecessary to repeat the facts in full. When the *deceased* left his seat, some thirty feet distant, walked, *stealthily*, down the passage in the rear of Justice Field, and dealt the unsuspecting jurist two preliminary blows, doubtless, by way of reminding him that *the time for vengeance* had at last come, Justice Field was, already, at the traditional metaphorical "wall" of the law. He was sitting quietly at a table, back to the assailant, eating his breakfast, the side opposite being occupied by other passengers, some of whom were women, similarly engaged. When, in a dazed condition, he awoke to the reality of the situation, and saw the stalwart form of the deceased, with arm drawn back for a final mortal blow, there was no time to get under, or over, the table, had the law, under any circumstances, required such an act for his justification. Neagle could not seek a "wall" to justify his acts, without abandoning his charge to certain death. When, therefore, he sprang to his feet and cried, "Stop! stop! I am an officer," and saw the powerful arm of the deceased drawn back for the final deadly stroke, instantly change its direction to his left breast, apparently seeking his favorite weapon, the knife, and at the same time heard the half-suppressed, disappointed growl of recognition of the man, who, with the aid of half a dozen others, had finally succeeded in disarming him of his knife, at the court-room, a year before, the supreme moment had come; or, at least, with abundant reason, Neagle thought so, and fired the fatal shot. The testimony all concurs in showing this to be the state of facts, and the almost universal *consensus* of public opinion of the United States seems to justify the act. On that occasion, a second, or two seconds, signified, at least, two valuable lives, and a reason-

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able degree of prudence would justify a shot one, or two, seconds too soon, rather than a fraction of a second too late. Upon our minds the evidence leaves no doubt, whatever, that the homicide was fully justified by the circumstances.

We have seen in an eastern law journal, but with its disapproval, some adverse criticism upon the action of the petitioner, attributed to a quarter, ordinarily, entitled to great consideration and respect. But it is not for scholarly gentlemen of humane and peaceful instincts—gentlemen, who, in all probability, never in their lives saw a desperate man of stalwart frame and great strength in murderous action—it is not for them, sitting securely in their libraries, three thousand miles away, looking backward over the scene, to determine the exact point of time, when a man in Neagle's situation should fire at his assailant, in order to be justified by the law. It is not for them to say that the proper time had not yet come. To such, the proper time would never come. Neagle on the scene of action, facing the party making a murderous assault, knowing, by personal experience, his physical powers, and his desperate character; and by general reputation, his life-long habit of carrying arms; his readiness to use them, and his angry, murderous threats; and seeing his demoniac looks, his stealthy assault upon Justice Field, from behind, and remembering the sacred trust committed to his charge,—Neagle, in these trying circumstances, was the party to determine when the supreme moment for action had come; and if he, honestly, acted, with reasonable judgment and discretion, the law justifies him, even if he erred. But who will have the courage to stand up in the presence of the facts developed by the testimony in this case, and say that he fired the smallest fraction of a second too soon? In our judgment he acted, under the trying circumstances surrounding him, in good faith and with consummate courage, judgment, and discretion. The homicide was, in our opinion, clearly justifiable in law, and in the forum of sound, practical common sense, commendable. This being so, and the act having been "done . . . in pursuance of a law of the United States," as we have already seen, it cannot be an offense against, and the petitioner is not amenable to, the laws of the state. Let him be discharged.

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In order to present together a complete history of this important case, the opinion of the supreme court of the United States affirming the judgment of the circuit court is appended. (See 135 U. S. 1.)—REPORTER.

Mr. Justice MILLER, on behalf of the court, stated the case as follows:—

This was an appeal by Cunningham, sheriff of the county of San Joaquin, in the state of California, from a judgment of the circuit court of the United States for the Northern District of California, discharging David Neagle from the custody of said sheriff, who held him a prisoner on a charge of murder.

On the sixteenth day of August, 1889, there was presented to Judge Sawyer, the circuit judge of the United States for the ninth circuit, embracing the Northern District of California, a petition signed David Neagle, deputy United States marshal, by A. L. Farrish on his behalf. This petition represented that the said Farrish was a deputy marshal duly appointed for the Northern District of California by J. C. Franks, who was the marshal of that district. It further alleged that David Neagle was, at the time of the occurrences recited in the petition and at the time of filing it, a duly appointed and acting deputy United States marshal for the same district. It then proceeded to state that said Neagle was imprisoned, confined, and restrained of his liberty in the county jail in San Joaquin County, in the state of California, by Thomas Cunningham, sheriff of said county, upon a charge of murder, under a warrant of arrest, a copy of which was annexed to the petition. The warrant was as follows:—

“In the Justice’s Court of Stockton Township.

“STATE OF CALIFORNIA, }
COUNTY OF SAN JOAQUIN. }^{88.}

“The People of the State of California to any sheriff, constable, marshal, or policeman of said state, or of the county of San Joaquin:—

“Information on oath having been this day laid before me by Sarah A. Terry that the crime of murder, a felony, has been committed within said county of San Joaquin on the fourteenth day of August, A. D. 1889, in this, that one David S. Terry,

a human being, then and there being, was wilfully, unlawfully, feloniously, and with malice aforethought shot, killed, and murdered, and accusing Stephen J. Field and David Neagle thereof: You are therefore commanded forthwith to arrest the above-named Stephen J. Field* and David Neagle and bring them before me, at my office, in the city of Stockton, or, in case of my absence or inability to act, before the nearest and most accessible magistrate in the county.

"Dated at Stockton this fourteenth day of August, A. D. 1889.

H. V. J. SWAIN,

"Justice of the Peace."

"The defendant, David Neagle, having been brought before me on this warrant, is committed for examination to the sheriff of San Joaquin County, California.

"Dated August 15, 1889.

H. V. J. SWAIN,

"Justice of the Peace."

The petition then recited the circumstances of a rencontre between said Neagle and David S. Terry, in which the latter was instantly killed by two shots from a revolver in the hands of the former. The circumstances of this encounter and of what led to it will be considered with more particularity hereafter. The main allegation of this petition was that Neagle, as United States deputy marshal, acting under the orders of Marshal Franks, and in pursuance of instructions from the attorney-general of the United States, had, in consequence of an anticipated attempt at violence on the part of Terry against the Honorable Stephen J. Field, a justice of the supreme court of the United States, been in attendance upon said justice, and was sitting by his side at a breakfast table when a murderous assault was made by Terry on Judge Field, and in defense of

* The governor of California, on learning that a warrant had been issued for the arrest of Mr. Justice Field, promptly wrote to the attorney-general of the state, urging "the propriety of at once instructing the district attorney of San Joaquin County to dismiss the unwarranted proceeding against him," as his arrest "would be a burning disgrace to the state unless disavowed." The attorney-general as promptly responded by advising the district attorney that there was "no evidence to implicate Justice Field in said shooting," and that "public justice demands that the charge against him be dismissed;" which was accordingly done. (See *In re Field*, ante, p. 208.)

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the life of the judge the homicide was committed for which Neagle was held by Cunningham. The allegation was very distinct that Justice Field was engaged in the discharge of his duties as circuit justice of the United States for that circuit, having held court at Los Angeles, one of the places at which the court is by law held, and, having left that court, was on his way to San Francisco for the purpose of holding the circuit court at that place. The allegation was also very full that Neagle was directed by Marshal Franks to accompany him for the purpose of protecting him, and that these orders of Franks were given in anticipation of the assault which actually occurred. It was also stated, in more general terms, that Marshal Neagle, in killing Terry under the circumstances, was in the discharge of his duty as an officer of the United States, and was not, therefore, guilty of a murder, and that his imprisonment under the warrant held by Sheriff Cunningham was in violation of the laws and constitution of the United States, and that he was in custody for an act done in pursuance of the laws of the United States. This petition being sworn to by Farrish, and presented to Judge Sawyer, he made the following order:—

“Let a writ of habeas corpus issue in pursuance of the prayer of the within petition, returnable before the United States circuit court for the Northern District of California.

“SAWYER, Circuit Judge.”

The writ was accordingly issued and delivered to Cunningham, who made the following return:—

“COUNTY OF SAN JOAQUIN, STATE OF CALIFORNIA.

“SHERIFF’S OFFICE.

“*To the Honorable Circuit Court of the United States for the Northern District of California.*

“I hereby certify and return that before the coming to me of the annexed writ of habeas corpus, the said David Neagle was committed to my custody, and is detained by me by virtue of a warrant issued out of the justice’s court of Stockton Township, state of California, county of San Joaquin, and by the indorsement made upon said warrant. Copy of said warrant and indorsement is annexed hereto and made a part of this return.

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Nevertheless, I have the body of the said David Neagle before the honorable court, as I am in the said writ commanded.

“August 17, 1889.

THOS. CUNNINGHAM,

“Sheriff San Joaquin County, California.”

Various pleadings and amended pleadings were made which do not tend much to the elucidation of the matter before us. Cunningham filed a demurrer to the petition for the writ of habeas corpus and Neagle filed a traverse to the return of the sheriff, which was accompanied by exhibits, the substance of which will be hereafter considered when the case comes to be examined upon its facts.

The hearing in the circuit court was had before Circuit Judge Sawyer and District Judge Sabin. The sheriff, Cunningham, was represented by G. A. Johnson, attorney-general of the state of California, and other counsel. A large body of testimony, documentary and otherwise, was submitted to the court, on which, after a full consideration of the subject, the court made the following order:—

“*In the matter of David Neagle, on habeas corpus.*

“In the above-entitled matter, the court having heard the testimony introduced on behalf of the petitioner, none having been offered for the respondent, and also the arguments of the counsel for petitioner and respondent, and it appearing to the court that the allegations of the petitioner in his amended answer or traverse to the return of the sheriff of San Joaquin County, respondent herein, are true, and that the prisoner is in custody for an act done in pursuance of a law of the United States, and in custody in violation of the constitution and laws of the United States, it is therefore ordered that petitioner be, and he is hereby, discharged from custody.”

From that order an appeal was allowed which brought the case to this court, accompanied by a voluminous record of all the matters which were before the court on the hearing.

Mr. Justice MILLER, after stating the case as above, delivered the opinion of the court.

If it be true, as stated in the order of the court discharging the prisoner, that he was held “in custody for an act done in

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pursuance of a law of the United States, and in custody in violation of the constitution and laws of the United States," there does not seem to be any doubt that, under the statute on that subject, he was properly discharged by the circuit court.

Section 753 of the Revised Statutes reads as follows: "The writ of habeas corpus shall in no case extend to a prisoner in jail, unless where he is in custody under or by color of the authority of the United States; or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; or is in custody in violation of the constitution, or of a law or treaty of the United States; or, being a subject or citizen of a foreign state, and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations; or unless it is necessary to bring the prisoner into court to testify."

And section 761 declares, that when by the writ of habeas corpus the petitioner is brought up for a hearing, the "court or justice or judge shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require." This of course means that if he is held in custody in violation of the constitution or a law of the United States, or for an act done or omitted in pursuance of a law of the United States, he must be discharged.

By the law, as it existed at the time of the enactment of the Revised Statutes, an appeal could be taken to the circuit court from any court of justice or judge inferior to the circuit court in a certain class of habeas corpus cases. But there was no appeal to the supreme court in any case except where the prisoner was the subject or citizen of a foreign state, and was committed or confined under the authority or law of the United States, or of any state, on account of any act done or omitted to be done under the commission or authority of a foreign state, the validity of which depended upon the law of nations. But after-

wards, by the act of Congress of March 3, 1885 (23 Stats 437), this was extended by amendment as follows:—

“That section seven hundred and sixty-four of the Revised Statutes be amended so that the same shall read as follows: ‘From the final decision of such circuit court an appeal may be taken to the supreme court in the cases described in the preceding section.’”

The preceding section here referred to is section 763, and is the one on which the prisoner relies for his discharge from custody in this case.

It will be observed that in both the provisions of the Revised Statutes, and of this latter act of Congress, the mode of review, whether by the circuit court or the judgment of an inferior court, or justice, or judge, or by this court or the judgment of a circuit court, the word “appeal,” and not “writ of error,” is used, and as Congress has always used these words with a clear understanding of what is meant by them, namely, that by a writ of error only questions of law are brought up for review, as in actions at common law, while by an appeal, except when specially provided otherwise, the entire case on both law and facts is to be reconsidered, there seems to be little doubt that, so far as it is essential to a proper decision of this case, the appeal requires us to examine into the evidence brought to sustain or defeat the right of the petitioner to his discharge.

The history of the incidents which led to the tragic event of the killing of Terry by the prisoner Neagle had its origin in a suit brought by William Sharon of Nevada, in the circuit court of the United States for the district of California, against Sarah Althea Hill, alleged to be a citizen of California, for the purpose of obtaining a decree adjudging a certain instrument in writing, possessed and exhibited by her, purporting to be a declaration of marriage between them, under the Code of California, to be a forgery, and to have it set aside and annulled. This suit, which was commenced October 3, 1883, was finally heard before Judge Sawyer, the circuit judge for that circuit, and Judge Deady, United States district judge for Oregon, who had been duly appointed to assist in holding the circuit court for the district of California. The hearing was on Sep-

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tember 29, 1885, and on the 15th of January, 1886, a decree was rendered granting the prayer of the bill. In that decree it was declared that the instrument purporting to be a declaration of marriage, set out and described in the bill of complaint, "was not signed or executed at any time by William Sharon, the complainant; that it is not genuine; that it is false, counterfeited, fabricated, forged, and fraudulent, and as such, is utterly null and void. And it is further ordered and decreed that the respondent, Sarah Althea Hill, deliver up and deposit with the clerk of the court said instrument, to be indorsed, 'canceled,' and that the clerk write across it 'canceled,' and sign his name and affix his seal thereto."

The rendition of this decree was accompanied by two opinions, the principal one being written by Judge Deady and a concurring one by Judge Sawyer. They were very full in their statement of the fraud and forgery practiced by Miss Hill, and stated that it was also accompanied by perjury. And inasmuch as Mr. Sharon had died between the hearing of the argument of the case on the 29th of September, 1885, and the time of rendering this decision, January 15, 1886, an order was made setting forth that fact, and declaring that the decree was entered as of the date of the hearing, *nunc pro tunc*.

Nothing was done under this decree. The defendant, Sarah Althea Hill, did not deliver up the instrument to the clerk to be canceled, but she continued to insist upon its use in the state court. Under these circumstances, Frederick W. Sharon, as the executor of the will of his father, William Sharon, filed in the circuit court for the Northern District of California, on March 12, 1888, a bill of revivor, stating the circumstances of the decree, the death of his father, and that the decree had not been performed; alleging also the intermarriage of Miss Hill with David S. Terry, of the city of Stockton, in California, and making the said Terry and wife parties to this bill of revivor. The defendants both demurred and answered, resisting the prayer of the plaintiff, and denying that the petitioner was entitled to any relief.

This case was argued in the circuit court before Field, Circuit Justice, Sawyer, Circuit Judge, and Sabin, District Judge.

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While the matter was held under advisement, Judge Sawyer, on returning from Los Angeles, in the Southern District of California, where he had been holding court, found himself on the train as it left Fresno, which is understood to have been the residence of Terry and wife, in a car in which he noticed that Mr. and Mrs. Terry were in a section behind him, on the same side. On this trip from Fresno to San Francisco, Mrs. Terry grossly insulted Judge Sawyer, and had her husband change seats so as to sit directly in front of the judge, while she passed him with insolent remarks, and pulled his hair with a vicious jerk, and then, in an excited manner, taking her seat by her husband's side, said: "I will give him a taste of what he will get by and by. Let him render this decision if he dares,"—the decision being the one already mentioned, then under advisement. Terry then made some remark about too many witnesses being in the car, adding that "the best thing to do with him would be to take him out into the bay and drown him." These incidents were witnessed by two gentlemen who knew all the parties, and whose testimony is found in the record before us.

This was August 14, 1888. On the 3d of September, the court rendered its decision granting the prayer of the bill of revivor in the name of Frederick W. Sharon and against Sarah Althea Terry and her husband, David S. Terry. The opinion was delivered by Mr. Justice Field, and during its delivery a scene of great violence occurred in the court-room. It appears that shortly before the court opened on that day, both the defendants in the case came into the court-room, and took seats within the bar at the table next the clerk's desk, and almost immediately in front of the judges. Besides Mr. Justice Field there were present on the bench Judge Sawyer and Judge Sabin, of the district court of the United States for the district of Nevada. The defendants had denied the jurisdiction of the court originally to render the decree sought to be revived, and the opinion of the court necessarily discussed this question without reaching the merits of the controversy. When allusion was made to this question Mrs. Terry rose from her seat, and addressing the justice who was delivering the opinion,

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asked in an excited manner whether he was going to order her to give up the marriage contract to be canceled. Mr. Justice Field said: "Be seated, madam." She repeated the question, and was again told to be seated. She then said, in a very excited and violent manner, that Justice Field had been bought, and wanted to know the price he had sold himself for; that he had got Newlands' money for it, and everybody knew that he had got it, or words to that effect. Mr. Justice Field then directed the marshal to remove her from the court-room. She asserted that she would not go from the room, and that no one could take her from it.

Marshal Franks proceeded to carry out the order of the court by attempting to compel her to leave, when Terry, her husband, rose from his seat under great excitement, exclaiming that no man living should touch his wife, and struck the marshal a blow in his face so violent as to knock out a tooth. He then unbuttoned his coat, thrust his hand under his vest, apparently for the purpose of drawing a bowie-knife, when he was seized by persons present and forced down on his back. In the meantime Mrs. Terry was removed from the court-room by the marshal, and Terry was allowed to rise, and was accompanied by officers to the door leading to the marshal's office. As he was about leaving the room, or immediately after being out of it, he succeeded in drawing a bowie-knife, when his arms were seized by a deputy marshal and others present to prevent him from using it, and they were able to wrench it from him only after a severe struggle. The most prominent person engaged in wrestling the knife from Terry was Neagle, the prisoner now in court.

For this conduct both Terry and his wife were sentenced by the court to imprisonment for contempt, Mrs. Terry for one month and Terry for six months, and these sentences were immediately carried into effect. Both the judgment of the court on the petition for the revival of the decree in the case of Sharon against Hill and the judgment of the circuit court imprisoning Terry and wife for contempt have been brought to this court for review, and in both cases the judgments have been affirmed. The report of the cases may be found in *Ex parte Terry*, 128 U. S. 289, and *Terry v. Sharon*, 131 U. S. 40.

Terry and Mrs. Terry were separately indicted by the grand jury of the circuit court of the United States during the same term for their part in these transactions, and the cases were pending in said court at the time of Terry's death. It also appears that Mrs. Terry, during her part of this altercation in the court-room, was making efforts to open a small satchel which she had with her, but through her excitement she failed. This satchel, which was taken from her, was found to have in it a revolving pistol.

From that time until his death the denunciations by Terry and his wife of Mr. Justice Field were open, frequent, and of the most vindictive and malevolent character. While being transported from San Francisco to Alameda, where they were imprisoned, Mrs. Terry repeated a number of times that she would kill both Judge Field and Judge Sawyer. Terry, who was present, said nothing to restrain her, but added that *he* was not through with Judge Field yet; and, while in jail at Alameda, Terry said that after he got out of jail he would horsewhip Judge Field; and that he did not believe he would ever return to California, but this earth was not large enough to keep him from finding Judge Field and horsewhipping him; and, in reply to a remark that this would be a dangerous thing to do, and that Judge Field would resent it, he said: "If Judge Field resents it I will kill him." And while in jail Mrs. Terry exhibited to a witness Terry's knife, at which he laughed, and said, "Yes, I always carry that," and made a remark about judges and marshals, that "they were all a lot of cowardly curs," and he would "see some of them in their graves yet." Mrs. Terry also said that she expected to kill Judge Field some day.

Perhaps the clearest expression of Terry's feelings and intentions in the matter was in a conversation with Mr. Thomas T. Williams, editor of one of the daily newspapers of California. This interview was brought about by a message from Terry requesting Williams to call and see him. In speaking of the occurrences in the court, he said that Justice Field had put a lie in the record about him, and when he met Field he would have to take that back, "and if he did not take it back and

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apologize for having lied about him, he would slap his face or pull his nose." "I said to him," said the witness, "'Judge Terry, would not that be a dangerous thing to do? Justice Field is not a man who would permit any one to put a deadly insult upon him like that.' He said, 'Oh, Field won't fight.' I said, 'Well, Judge, I have found nearly all men will fight; nearly every man will fight when there is occasion for it, and Judge Field has had a character in this state of having the courage of his convictions, and being a brave man.' At the conclusion of that branch of the conversation, I said to him, 'Well, Judge Field is not your physical equal, and if any trouble should occur he would be very likely to use a weapon.' He said, 'Well, that's as good a thing as I want to get.' The whole impression conveyed to me by this conversation was, that he felt he had some cause of grievance against Judge Field; that he hoped they might meet, that he might have an opportunity to force a quarrel upon him, and he would get him into a fight." Mr. Williams says that after the return of Justice Field to California in the spring or summer of 1889, he had other conversations with Terry, in which the same vindictive feelings of hatred were manifested and expressed by him.

It is useless to go over the testimony on this subject more particularly. It is sufficient to say that the evidence is abundant that both Terry and wife contemplated some attack upon Judge Field during his official visit to California in the summer of 1889, which they intended should result in his death. Many of these matters were published in the newspapers, and the press of California was filled with the conjectures of a probable attack by Terry on Justice Field, as soon as it became known that he was going to attend the circuit court in that year.

So much impressed were the friends of Judge Field, and of public justice, both in California and in Washington, with the fear that he would fall a sacrifice to the resentment of Terry and his wife, that application was made to the attorney-general of the United States suggesting the propriety of his furnishing some protection to the judge while in California. This resulted in a correspondence between the attorney-general of the United States, the district attorney, and the marshal of the Northern

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District of California on that subject. This correspondence is here set out:—

“DEPARTMENT OF JUSTICE,

“WASHINGTON, April 27, 1889.

“*John C. Franks, United States Marshal, San Francisco, Cal.*
—SIR: The proceedings which have heretofore been had in connection with the case of Mr. and Mrs. Terry in your United States circuit court have become matter of public notoriety, and I deem it my duty to call your attention to the propriety of exercising unusual caution, in case further proceedings shall be had in that case, for the protection of his Honor, Justice Field, or whoever may be called upon to hear and determine the matter. Of course, I do not know what may be the feelings or purpose of Mr. and Mrs. Terry in the premises, but many things which have happened indicate that violence on their part is not impossible. It is due to the dignity and independence of the court and the character of its judge that no effort on the part of the government shall be spared to make them feel entirely safe and free from anxiety in the discharge of their high duties.

“You will understand, of course, that this letter is not for the public, but to put you upon your guard. It will be proper for you to show it to the district attorney, if deemed best.

“Yours truly,

W. H. H. MILLER,

“Attorney-General.”

“UNITED STATES MARSHAL’S OFFICE,

“NORTHERN DISTRICT OF CALIFORNIA,

“SAN FRANCISCO, May 6, 1889.

“*Hon. W. H. H. Miller, Attorney-General, Washington, D. C.*
—SIR: Yours of the 27th ultimo, at hand.

“When the Hon. Judge Lorenzo Sawyer, our circuit judge, returned from Los Angeles (some time before the celebrated court scene) and informed me of the disgraceful action of Mrs. Terry towards him on the cars, while her husband sat in front smilingly approving it, I resolved to watch the Terrys (and so notified my deputies) whenever they should enter the courtroom, and be ready to suppress the very first indignity offered by either of them to the judges. After this, at the time of their

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ejection from the court-room, when I held Judge Terry and his wife as prisoners in my private office and heard his threats against Justice Field, I was more fully determined than ever to throw around the Justice and Judge Sawyer every safeguard I could.

“I have given the matter careful consideration, with the determination to fully protect the federal judges at this time, trusting that the department will re-imburse me for any reasonable expenditure.

“I have always, whenever there is any likelihood of either Judge or Mrs. Terry appearing in court, had a force of deputies with myself on hand to watch their every action. You can rest assured that when Justice Field arrives, he, as well as all the federal judges, will be protected from insults, and where an order is made it will be executed without fear as to consequences. I shall follow your instructions, and act with more than usual caution. I have already consulted with the United States attorney, J. T. Carey, Esq., as to the advisability of making application to you, at the time the Terrys are tried upon criminal charges, for me to select two or more detectives to assist in the case, and also assist me in protecting Justice Field while in my district. I wish the judges to feel secure, and for this purpose will see to it that their every wish is promptly obeyed. I notice your remarks in regard to the publicity of your letter, and will obey your request. I shall only be too happy to receive any suggestions from you at any time.

“The opinion among the better class of citizens here is very bitter against the Terrys, though, of course, they have their friends, and unfortunately, among that class it is necessary to watch. Your most obedient servant,

“J. C. FRANKS,

“U. S. Marshal Northern Dist. of Cal.”

“SAN FRANCISCO, CAL., May 7, 1889.

“Hon. W. H. H. MILLER, *U. S. Attorney-General, Washington, D. C.*—DEAR SIR: Marshal Franks exhibited to me your letter bearing date the 27th ult., addressed to him upon the subject of using due caution by way of protecting Justice Field and the federal judges here in the discharge of their duties in matters

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in which the Terrys are interested. I noted your suggestion with a great degree of pleasure, not because our marshal is at all disposed to leave anything undone within his authority or power to do, but because it encouraged him to know and feel that the Head of our Department was in full sympathy with the efforts being made to protect the judges and vindicate the dignity of our courts.

“I write merely to suggest that there is just reason, in the light of the past, and the threats made by Judge and Mrs. Terry against Justice Field and Judge Sawyer, to apprehend personal violence at any moment and at any place, as well in court as out of court, and that while due caution has always been taken by the marshal when either Judge or Mrs. Terry is about the building in which the courts are held, he has not felt it within his authority to guard either Judge Sawyer or Justice Field against harm when away from the appraisers’ building.

“Discretion dictates, however, that a protection should be thrown about them at other times and places, when proceedings are being had before them in which the Terrys are interested, and I verily believe, in view of the direful threats made against Justice Field, that he will be in great danger at all times while here.

“Mr. Franks is a prudent, cool, and courageous officer, who will not abuse any authority granted him. I would therefore suggest that he be authorized in his discretion to retain one or more deputies, at such times as he may deem necessary, for the purposes suggested. That publicity may not be given to the matter, it is important that the deputies whom he may select be not known as such, and that efficient service may be assured for the purposes indicated, it seems to me that they should be strangers to the Terrys.

“The Terrys are unable to appreciate that an officer should perform his official duty when that duty in any way requires his efforts to be directed against them. The marshal, his deputies, and myself suffer daily indignities and insults from Mrs. Terry, in court and out of court, committed in the presence of her husband and without interference upon his part. I do not purpose being deterred from any duty, nor do I purpose being

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intimidated in the least degree from doing my whole duty in the premises, but I shall feel doubly assured in being able to do so, knowing that our marshal has your kind wishes and encouragement in doing everything needed to protect the officers of the court in the discharge of their duties.

“This, of course, is not intended for the public files of your office, nor will it be on file in my office. Prudence dictates great caution on the part of the officials who may be called upon to have anything to do in the premises, and I deem it to be of the greatest importance that the suggestions back and forth be confidential.

“I shall write you further upon the subject of these cases in a few days.

“I have the honor to be, your most obedient servant,

“JOHN T. CAREY,

“U. S. Attorney.”

“DEPARTMENT OF JUSTICE,

“WASHINGTON, D. C., May 27, 1889.

“*J. C. Franks, Esq., United States Marshal, San Francisco, Cal.*—SIR: Referring to former correspondence of the department relating to a possible disorder in the session of the approaching term of court, owing to the small number of bailiffs under your control to preserve order, you are directed to employ certain special deputies at a *per diem* of five dollars, payable out of the appropriation for fees and expenses of marshals, to be submitted to the court as a separate account from your other accounts against the government for approval, under section 846, Revised Statutes, as an extraordinary expense, that the same may be forwarded to this department in order to secure executive action and approval.

“Very respectfully,

W. H. H. MILLER,

“Attorney-General.”

The result of this correspondence was that Marshal Franks appointed Mr. Neagle a deputy marshal for the Northern District of California, and gave him special instructions to attend upon Judge Field both in court and while going from one court to another, and protect him from any assault that might

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be attempted upon him by Terry and wife. Accordingly, when Judge Field went from San Francisco to Los Angeles to hold the circuit court of the United States at that place, Mr. Neagle accompanied him, remained with him for the few days that he was engaged in the business of that court, and returned with him to San Francisco.

It appears from the uncontradicted evidence in the case that while the sleeping-car, in which were Justice Field and Mr. Neagle, stopped a moment in the early morning at Fresno, Terry and wife got on the train. The fact that they were on the train became known to Neagle, and he held a conversation with the conductor as to what peace officers could be found at Lathrop, where the train stopped for breakfast, and the conductor was requested to telegraph to the proper officers of that place to have a constable or some peace officer on the ground when the train should arrive, anticipating that there might be violence attempted by Terry upon Judge Field. It is sufficient to say that this resulted in no available aid to assist in keeping the peace. When the train arrived, Neagle informed Judge Field of the presence of Terry on the train, and advised him to remain and take his breakfast in the car. This the Judge refused to do, and he and Neagle got out of the car and went into the dining-room, and took seats beside each other in the place assigned them by the person in charge of the breakfast-room, and very shortly after this Terry and wife came into the room; and Mrs. Terry, recognizing Judge Field, turned and left in great haste, while Terry passed beyond where Judge Field and Neagle were and took his seat at another table. It was afterwards ascertained that Mrs. Terry went to the car, and took from it a satchel in which was a revolver. Before she returned to the eating-room, Terry arose from his seat, and, passing around the table in such a way as brought him behind Judge Field, who did not see him or notice him, came up where he was sitting with his feet under the table, and struck him a blow on the side of his face, which was repeated on the other side. He also had his arm drawn back and his fist doubled up, apparently to strike a third blow, when Neagle, who had been observing him all this time, arose from his seat with his revolver

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in his hand, and in a very loud voice shouted out, "Stop! stop! I am an officer!" Upon this Terry turned his attention to Neagle, and, as Neagle testifies, seemed to recognize him, and immediately turned his hand to thrust it in his bosom, as Neagle felt sure, with the purpose of drawing a bowie-knife. At this instant Neagle fired two shots from his revolver into the body of Terry, who immediately sank down and died in a few minutes.

Mrs. Terry entered the room with the satchel in her hand just after Terry sank to the floor. She rushed up to the place where he was, threw herself upon his body, made loud exclamations and moans, and commenced inviting the spectators to avenge her wrong upon Field and Neagle. She appeared to be carried away by passion, and in a very earnest manner charged that Field and Neagle had murdered her husband intentionally, and shortly afterwards she appealed to the persons present to examine the body of Terry to see that he had no weapons. This she did once or twice. The satchel which she had, being taken from her, was found to contain a revolver.

These are the material circumstances produced in evidence before the circuit court on the hearing of this habeas corpus case. It is but a short sketch of a history which is given in over five hundred pages in the record, but we think it is sufficient to enable us to apply the law of the case to the question before us. Without a more minute discussion of this testimony, it produces upon us the conviction of a settled purpose on the part of Terry and his wife, amounting to a conspiracy, to murder Justice Field. And we are quite sure that if Neagle had been merely a brother or a friend of Judge Field, traveling with him, and aware of all the previous relations of Terry to the judge—as he was—of his bitter animosity, his declared purpose to have revenge even to the point of killing him, he would have been justified in what he did in defense of Mr. Justice Field's life, and possibly of his own.

But such a justification would be a proper subject for consideration on a trial of the case for murder in the courts of the state of California, and there exists no authority in the courts of the United States to discharge the prisoner while held in custody by the state authorities for this offense, unless there be

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found in aid of the defense of the prisoner some element of power and authority asserted under the government of the United States.

This element is said to be found in the facts that Mr. Justice Field, when attacked, was in the immediate discharge of his duty as judge of the circuit courts of the United States within California; that the assault upon him grew out of the animosity of Terry and his wife, arising out of the previous discharge of his duty as circuit justice in the case for which they were committed for contempt of court; and that the deputy marshal of the United States, who killed Terry in defense of Field's life, was charged with a duty under the law of the United States to protect Field from the violence which Terry was inflicting, and which was intended to lead to Field's death.

To the inquiry whether this proposition is sustained by law, and the facts which we have recited, we now address ourselves.

Mr. Justice Field was a member of the supreme court of the United States, and had been a member of that court for over a quarter of a century, during which he had become venerable for his age and for his long and valuable service in that court. The business of the supreme court has become so exacting that for many years past the justices of it have been compelled to remain for the larger part of the year in Washington City, from whatever part of the country they may have been appointed. The term for each year, including the necessary travel and preparations to attend at its beginning, has generally lasted from eight to nine months.

But the justices of this court have imposed upon them other duties, the most important of which arise out of the fact that they are also judges of the circuit courts of the United States. Of these circuits there are nine, to each one of which a justice of the supreme court is allotted, under section 606 of the Revised Statutes, the provision of which is as follows:—

“The chief justice and associate justices of the supreme court shall be allotted among the circuits by an order of the court, and a new allotment shall be made whenever it becomes necessary or convenient by reason of the alteration of any circuit, or of the new appointment of a chief justice or associate justice, or otherwise.”

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Section 610 declares that it "shall be the duty of the chief justice, and of each justice of the supreme court, to attend at least one term of the circuit court, in each district of the circuit to which he is allotted, during every period of two years."

Although this enactment does not require in terms that the justices shall go to their circuits more than once in two years, the effect of it is to compel most of them to do this, because there are so many districts in many of the circuits that it is impossible for the circuit justice to reach them all in one year, and the result of this is that he goes to some of them in one year, and to others in the next year, thus requiring an attendance in the circuit every year.

The justices of the supreme court have been members of the circuit courts of the United States ever since the organization of the government, and their attendance on the circuit and appearance at the places where the courts are held has always been thought to be a matter of importance. In order to enable him to perform this duty, Mr. Justice Field had to travel each year from Washington City, near the Atlantic coast, to San Francisco, on the Pacific coast. In doing this he was as much in the discharge of a duty imposed upon him by law as he was while sitting in court and trying causes. There are many duties which the judge performs outside of the court-room where he sits to pronounce judgment or to preside over a trial. The statutes of the United States, and the established practice of the courts, require that the judge perform a very large share of his judicial labors at what is called "chambers." This chamber work is as important as necessary, as much a discharge of his official duty as that performed in the court-house. Important cases are often argued before the judge at any place convenient to the parties concerned, and a decision of the judge is arrived at by investigations made in his own room, wherever he may be, and it is idle to say that this is not as much the performance of judicial duty as the filing of the judgment with the clerk, and the announcement of the result in open court.

So it is impossible for a justice of the supreme court of the United States, who is compelled by the obligations of duty to be so much in Washington City, to discharge his duties of

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attendance on the circuit courts as prescribed by section 610, without traveling in the usual and most convenient modes of doing it to the place where the court is to be held. This duty is as much an obligation imposed by the law as if it had said in words, "the justices of the supreme court shall go from Washington City to the place where their terms are held every year."

Justice Field had not only left Washington and traveled the three thousand miles or more which were necessary to reach his circuit, but he had entered upon the duties of that circuit, had held the court at San Francisco for some time; and, taking a short leave of that court, had gone down to Los Angeles, another place where a court was to be held, and sat as a judge there for several days, hearing cases and rendering decisions. It was in the necessary act of returning from Los Angeles to San Francisco, by the usual mode of travel between the two places, where his court was still in session, and where he was required to be, that he was assaulted by Terry in the manner which we have already described.

The occurrence which we are called upon to consider was of so extraordinary a character that it is not to be expected that many cases can be found to cite as authority upon the subject.

In the case of *United States v. The Schooner Little Charles*, 1 Brock. 380, 382, a question arose before Chief Justice Marshall, holding the circuit court of the United States for Virginia, as to the validity of an order made by the district judge at his chambers, and not in court. The act of Congress authorized stated terms of the district court, and gave the judge power to hold special courts at his discretion, either at the place appointed by the law, or such other place in the district as the nature of the business and his discretion should direct. He says: "It does not seem to be a violent construction of such an act to consider the judge as constituting a court whenever he proceeds on judicial business;" and cites the practice of the courts in support of that view of the subject.

In the case of *United States v. Gleason*, 1 Wool. C. C. 128, 132, the prisoner was indicted for the murder of two enrolling officers who were charged with the duty of arresting deserters, or those who had been drafted into the service and had failed to attend.

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These men, it was said, had visited the region of country where they were murdered, and, having failed of accomplishing their purpose of arresting the deserters, were on their return to their home when they were killed, and the court was asked to instruct the jury that under these circumstances they were not engaged in the duty of arresting the deserters named. "It is claimed by the counsel for the defendant," says the report, "that if the parties killed had been so engaged, and had come to that neighborhood with the purpose of arresting the supposed deserters, but at the moment of the assault had abandoned the purpose of making the arrest at that time, and were returning to headquarters at Grinnell, with a view to making other arrangements for arrest at another time, they were not so engaged as to bring the case within the law." But the court held that this was not a sound construction of the statute, and "that if the parties killed had come into that neighborhood with intent to arrest the deserters named, and had been employed by the proper officer for that service, and were, in the proper prosecution of that purpose, returning to Grinnell with a view to making other arrangements to discharge this duty, they were still engaged in arresting the deserters, within the meaning of the statute. It is not necessary," said the court, "that the party killed should be engaged in the immediate act of arrest, but it is sufficient if he be employed in and about that business when assaulted. The purpose of the law is to protect the life of the person so employed, and this protection continues so long as he is engaged in a service necessary and proper to that employment."

We have no doubt that Mr. Justice Field when attacked by Terry was engaged in the discharge of his duties as circuit justice of the ninth circuit, and was entitled to all the protection under those circumstances which the law could give him.

It is urged, however, that there exists no statute authorizing any such protection as that which Neagle was instructed to give Judge Field in the present case, and indeed no protection whatever against a vindictive or malicious assault growing out of the faithful discharge of his official duties; and that the language of section 753 of the Revised Statutes, that the party seeking the benefit of the writ of habeas corpus must in this

connection show that he is “in custody for an act done or omitted in pursuance of a law of the United States,” makes it necessary that upon this occasion it should be shown that the act for which Neagle is imprisoned was done by virtue of an act of Congress. It is not supposed that any special act of Congress exists which authorizes the marshals or deputy marshals of the United States in express terms to accompany the judges of the supreme court through their circuits, and act as a body-guard to them, to defend them against malicious assaults against their persons. But we are of opinion that this view of the statute is an unwarranted restriction of the meaning of a law, designed to extend in a liberal manner the benefit of the writ of habeas corpus to persons imprisoned for the performance of their duty. And we are satisfied that if it was the duty of Neagle, under the circumstances, a duty which could only arise under the laws of the United States, to defend Mr. Justice Field from a murderous attack upon him, he brings himself within the meaning of the section we have recited. This view of the subject is confirmed by the alternative provision, that he must be in custody “for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof, or is in custody in violation of the constitution, or of a law or treaty of the United States.”

In the view we take of the constitution of the United States, any obligation fairly and properly inferable from that instrument, or any duty of the marshal to be derived from the general scope of his duties under the laws of the United States, is a “law” within the meaning of this phrase. It would be a great reproach to the system of government of the United States, declared to be within its sphere sovereign and supreme, if there is to be found within the domain of its powers no means of protecting the judges, in the conscientious and faithful discharge of their duties, from the malice and hatred of those upon whom their judgments may operate unfavorably.

It has in modern times become apparent that the physical health of the community is more efficiently promoted by hygienic and preventive means, than by the skill which is applied to the cure of disease after it has become fully developed. So

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also the law, which is intended to prevent crime, in its general spread among the community, by regulations, police organization, and otherwise, which are adapted for the protection of the lives and property of citizens, for the dispersion of mobs, for the arrest of thieves and assassins, for the watch which is kept over the community, as well as over this class of people, is more efficient than punishment of crimes after they have been committed.

If a person in the situation of Judge Field could have no other guarantee of his personal safety, while engaged in the conscientious discharge of a disagreeable duty, than the fact that if he was murdered his murderer would be subject to the laws of a state, and by those laws could be punished, the security would be very insufficient. The plan which Terry and wife had in mind of insulting him and assaulting him and drawing him into a defensive physical contest, in the course of which they would slay him, shows the little value of such remedies. We do not believe that the government of the United States is thus inefficient, or that its constitution and laws have left the high officers of the government so defenseless and unprotected.

The views expressed by this court through Mr. Justice Bradley, in *Ex parte Siebold*, 100 U. S. 371, 394, are very pertinent to this subject, and express our views with great force. That was a case of a writ of habeas corpus, where Siebold had been indicted in the circuit court of the United States for the district of Maryland, for an offense committed against the election laws, during an election at which members of Congress and officers of the state of Maryland were elected. He was convicted, and sentenced to fine and imprisonment, and filed his petition in this court for a writ of habeas corpus, to be relieved on the ground that the court which had convicted him was without jurisdiction. The foundation of this allegation was that the Congress of the United States had no right to prescribe laws for the conduct of the election in question, or for enforcing the laws of the state of Maryland by the courts of the United States. In the course of the discussion of the relative powers of the federal and state courts on this subject, it is said:—

“Somewhat akin to the argument which has been considered is the objection that the deputy marshals, authorized by the act of Congress to be created and to attend the elections, are authorized to keep the peace; and that this is a duty which belongs to the state authorities alone. It is argued that the preservation of peace and good order in society is not within the powers confided to the government of the United States, but belongs exclusively to the states. Here again we are met with the theory that the government of the United States does not rest upon the soil and territory of the country. We think that this theory is founded on an entire misconception of the nature and powers of that government. We hold it to be an incontrovertible principle, that the government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it. This necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent. This power to enforce its laws and to execute its functions in all places does not derogate from the power of the state to execute its laws at the same time and in the same places. The one does not exclude the other, except where both cannot be executed at the same time. In that case the words of the constitution itself show which is to yield. ‘This constitution, and all laws which shall be made in pursuance thereof, . . . shall be the supreme law of the land.’ . . . Without the concurrent sovereignty referred to, the national government would be nothing but an advisory government. Its executive power would be absolutely nullified. Why do we have marshals at all, if they cannot physically lay their hands on persons and things in the performance of their proper duties? What functions can they perform, if they cannot use force? In executing the processes of the courts, must they call on the nearest constable for protection? must they rely on him to use the requisite compulsion, and to keep the peace, whilst they are soliciting and entreating the parties and by-standers to allow the law to take its course? This is the necessary consequence of the positions that are assumed. If we indulge in such impracticable views as these, and keep on refining and

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re-refining, we shall drive the national government out of the United States, and relegate it to the District of Columbia, or perhaps to some foreign soil. We shall bring it back to a condition of greater helplessness than that of the old confederation. . . . It must execute its powers, or it is no government. It must execute them on the land as well as on the sea, on things as well as on persons. And, to do this, it must necessarily have power to command obedience, preserve order, and keep the peace; and no person or power in this land has the right to resist or question its authority, so long as it keeps within the bounds of its jurisdiction."

At the same term of the court, in the case of *Tennessee v. Davis*, 100 U. S. 257, 262, where the same questions in regard to the relative powers of the federal and state courts were concerned, in regard to criminal offenses, the court expressed its views through Mr. Justice Strong, quoting from the case of *Martin v. Hunter*, 1 Wheat. 363, the following language: "The general government must cease to exist whenever it loses the power of protecting itself in the exercise of its constitutional powers;" and then proceeding: "It can act only through its officers and agents, and they must act within the states. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a state court, for an alleged offense against the law of the state, yet warranted by the federal authority they possess, and if the general government is powerless to interfere at once for their protection—if their protection must be left to the action of the state court—the operations of the general government may at any time be arrested at the will of one of its members. The legislation of a state may be unfriendly. It may affix penalties to acts done under the immediate direction of the national government, and in obedience to its laws. It may deny the authority conferred by those laws. The state court may administer not only the laws of the state, but equally federal law, in such a manner as to paralyze the operations of the government. And even if, after trial and final judgment in the state court, the case can be brought into the United States court for review, the officer is withdrawn from the discharge of his duty during the pendency

of the prosecution, and the exercise of acknowledged federal power arrested. We do not think such an element of weakness is to be found in the constitution. The United States is a government, with authority extending over the whole territory of the Union, acting upon the states and the people of the states. While it is limited in the number of its powers, so far as its sovereignty extends, it is supreme. No state government can exclude it from the exercise of any authority conferred upon it by the constitution, obstruct its authorized officers against its will, or withhold from it, for a moment, the cognizance of any subject which that instrument has committed to it."

To cite all the cases in which this principle of the supremacy of the government of the United States, in the exercise of all the powers conferred upon it by the constitution, is maintained, would be an endless task. We have selected these as being the most forcible expressions of the views of the court, having a direct reference to the nature of the case before us.

Where, then, are we to look for the protection which we have shown Judge Field was entitled to when engaged in the discharge of his official duties? Not to the courts of the United States; because, as has been more than once said in this court, in the division of the powers of the government between the three great departments, executive, legislative, and judicial, the judicial is the weakest for the purposes of self-protection, and for the enforcement of the powers which it exercises. The ministerial officers through whom its commands must be executed are marshals of the United States, and belong emphatically to the executive department of the government. They are appointed by the President, with the advice and consent of the Senate. They are removable from office at his pleasure. They are subjected by act of Congress to the supervision and control of the department of justice, in the hands of one of the cabinet officers of the President, and their compensation is provided by acts of Congress. The same may be said of the district attorneys of the United States, who prosecute and defend the claims of the government in the courts.

The legislative branch of the government can only protect the judicial officers by the enactment of laws for that purpose,

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and the argument we are now combating assumes that no such law has been passed by Congress.

If we turn to the executive department of the government, we find a very different condition of affairs. The Constitution, section 3, article 2, declares that the President "shall take care that the laws be faithfully executed," and he is provided with the means of fulfilling this obligation by his authority to commission all the officers of the United States, and by and with the advice and consent of the Senate, to appoint the most important of them and to fill vacancies. He is declared to be commander-in-chief of the army and navy of the United States. The duties which are thus imposed upon him he is further enabled to perform by the recognition in the constitution, and the creation by acts of Congress, of executive departments, which have varied in number from four or five to seven or eight, the heads of which are familiarly called cabinet ministers. These aid him in the performance of the great duties of his office, and represent him in a thousand acts to which it can hardly be supposed his personal attention is called, and thus he is enabled to fulfill the duty of his great department, expressed in the phrase that "he shall take care that the laws be faithfully executed."

Is this duty limited to the enforcement of acts of Congress or of treaties of the United States according to their *express terms*, or does it include the rights, duties, and obligations growing out of the constitution itself, our international relations, and all the protection implied by the nature of the government under the constitution?

One of the most remarkable episodes in the history of our foreign relations, and which has become an attractive historical incident, is the case of Martin Koszta, a native of Hungary, who, though not fully a naturalized citizen of the United States, had in due form of law made his declaration of intention to become a citizen. While in Smyrna he was seized by command of the Austrian consul-general at that place, and carried on board the Hussar, an Austrian vessel, where he was held in close confinement. Captain Ingraham, in command of the American sloop of war St. Louis, arriving in port at that

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critical period, and ascertaining that Koszta had with him his naturalization papers, demanded his surrender to him, and was compelled to train his guns upon the Austrian vessel before his demands were complied with. It was, however, to prevent bloodshed, agreed that Koszta should be placed in the hands of the French consul, subject to the result of diplomatic negotiations between Austria and the United States. The celebrated correspondence between Mr. Marcy, secretary of state, and Chevalier Hulsemann, the Austrian minister at Washington, which arose out of this affair, and resulted in the release and restoration to liberty of Koszta, attracted a great deal of public attention, and the position assumed by Mr. Marcy met the approval of the country and of Congress, who voted a gold medal to Captain Ingraham for his conduct in the affair. Upon what act of Congress then existing can any one lay his finger in support of the action of our government in this matter?

So, if the President or the postmaster-general is advised that the mails of the United States, possibly carrying treasure, are liable to be robbed and the mail carriers assaulted and murdered in any particular region of country, who can doubt the authority of the President or of one of the executive department under him to make an order for the protection of the mail and of the persons and lives of its carriers, by doing exactly what was done in the case of Mr. Justice Field, namely, providing a sufficient guard, whether it be by soldiers of the army or by marshals of the United States, with a *posse comitatus* properly armed and equipped, to secure the safe performance of the duty of carrying the mail wherever it may be intended to go?

The United States is the owner of millions of acres of valuable public land, and has been the owner of much more which it has sold. Some of these lands owe a large part of their value to the forests which grow upon them. These forests are liable to depredations by people living in the neighborhood, known as timber thieves, who make a living by cutting and selling such timber, and who are trespassers. But until quite recently, even if there be one now, there was no statute authorizing any preventive measures for the protection of this valuable public property. Has the President no authority to place guards upon

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the public territory to protect its timber? No authority to seize the timber when cut and found upon the ground? Has he no power to take any measures to protect this vast domain? Fortunately we find this question answered by this court in the case of *Wells v. Nickles*, 104 U. S. 444. That was a case in which a class of men appointed by local land officers, under instructions from the secretary of the interior, having found a large quantity of this timber cut down from the forests of the United States and lying where it was cut, seized it. The question of the title to this property coming in controversy between Wells and Nickles, it became essential to inquire into the authority of these timber agents of the government thus to seize the timber cut by trespassers on its lands. The court said: "The effort we have made to ascertain and fix the authority of these timber agents by any positive provision of law has been unsuccessful." But the court, notwithstanding there was no special statute for it, held that the department of the interior, acting under the idea of protecting from depredation timber on the lands of the government, had gradually come to assert the right to seize what is cut and taken away from them wherever it can be traced, and in aid of this the registers and receivers of the land office had, by instructions from the secretary of the interior, been constituted agents of the United States for these purposes, with power to appoint special agents under themselves. And the court upheld the authority of the secretary of the interior to make these rules and regulations for the protection of the public lands.

One of the cases in this court in which this question was presented in the most imposing form is that of *United States v. San Jacinto Tin Co.* 125 U. S. 273, 279, 280. In that case, a suit was brought in the name of the United States, by order of the attorney-general, to set aside a patent which had been issued for a large body of valuable land, on the ground that it was obtained from the government by fraud and deceit practiced upon its officers. A preliminary question was raised by counsel for defendant, which was earnestly insisted upon, as to the right of the attorney-general or any other officer of the government to institute such a suit in the absence of any act of Congress

authorizing it. It was conceded that there was no express authority given to the attorney-general to institute that particular suit, or any suit of that class. The question was one of very great interest, and was very ably argued both in the court below and in this court. The response of this court to that suggestion conceded that in the acts of Congress establishing the department of justice and defining the duties of the attorney-general, there was no such express authority, and it was said that there was also no express authority to him to bring suits against debtors of the government upon bonds, or to begin criminal prosecutions, or to institute criminal proceedings in any of the cases in which the United States was plaintiff, yet he was invested with the general superintendence of all such suits. It was further said: "If the United States, in any particular case, has a just cause for calling upon the judiciary of the country, in any of its courts, for relief, by setting aside or annulling any of its contracts, its obligations, or its most solemn instruments, the question of the appeal to the judicial tribunals of the country must primarily be decided by the attorney-general of the United States. That such a power should exist somewhere, and that the United States should not be more helpless in relieving itself of frauds, impostures, and deceptions than the private individual, is hardly open to argument. . . . There must, then, be an officer or officers of the government to determine when the United States shall sue, to decide for what it shall sue, and to be responsible that such suits shall be brought in appropriate cases. The attorneys of the United States in every judicial district are officers of this character, and they are by statute under the immediate supervision and control of the attorney-general. How, then, can it be argued that if the United States has been deceived, entrapped, or defrauded into the making, under the forms of law, of an instrument which injuriously affects its rights of property, or other rights, it cannot bring a suit to avoid the effect of such instrument, thus fraudulently obtained, without a special act of Congress in each case, or without some special authority applicable to this class of cases?" The same question was raised in the earlier case of *United States v. Hughes*, 11 How. 552, and decided the same way.

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We cannot doubt the power of the President to take measures for the protection of a judge of one of the courts of the United States, who, while in the discharge of the duties of his office, is threatened with a personal attack which may probably result in his death, and we think it clear that where this protection is to be afforded through the civil power, the department of justice is the proper one to set in motion the necessary means of protection. The correspondence already recited in this opinion between the marshal of the Northern District of California, and the attorney-general, and the district attorney of the United States for that district, although prescribing no very specific mode of affording this protection by the attorney-general, is sufficient, we think, to warrant the marshal in taking the steps which he did take, in making the provisions which he did make, for the protection and defense of Mr. Justice Field.

But there is positive law investing the marshals and their deputies with powers which not only justify what Marshal Neagle did in this matter, but which imposed it upon him as a duty. In chapter 14 of the Revised Statutes of the United States, which is devoted to the appointment and duties of the district attorneys, marshals, and clerks of the courts of the United States, section 788 declares:—

“The marshals and their deputies shall have, in each state, the same powers, in executing the laws of the United States, as the sheriffs and their deputies in such state may have, by law, in executing the laws thereof.”

If, therefore, a sheriff of the state of California was authorized to do in regard to the laws of California what Neagle did, that is, if he was authorized to keep the peace, to protect a judge from assault and murder, then Neagle was authorized to do the same thing in reference to the laws of the United States.

Section 4176 of the Political Code of California reads as follows:—

“The sheriff must:—

“*First*—Preserve the peace.

“*Second*—Arrest and take before the nearest magistrate for examination all persons who attempt to commit, or have committed a public offense.

“*Third*—Prevent and suppress all affrays, breaches of the peace, riots, and insurrections, which may come to his knowledge. . . .”

And the Penal Code of California declares (sec. 197) that homicide is justifiable when committed by any person “when resisting any attempt to murder any person, or to commit a felony, or to do some great bodily injury upon any person;” or “when committed in defense of habitation, property, or person against one who manifestly intends or endeavors by violence or surprise to commit a felony.”

That there is a peace of the United States; that a man assaulting a judge of the United States while in the discharge of his duties violates that peace; that in such case the marshal of the United States stands in the same relation to the peace of the United States which the sheriff of the county does to the peace of the state of California,—are questions too clear to need argument to prove them. That it would be the duty of a sheriff, if one had been present at this assault by Terry upon Judge Field, to prevent this breach of the peace, to prevent this assault, to prevent the murder which was contemplated by it, cannot be doubted. And if, in performing this duty, it became necessary for the protection of Judge Field, or of himself, to kill Terry, in a case where, like this, it was evidently a question of the choice of who should be killed, the assailant and violator of the law and disturber of the peace, or the unoffending man who was in his power, there can be no question of the authority of the sheriff to have killed Terry. So the marshal of the United States, charged with the duty of protecting and guarding the judge of the United States court against this special assault upon his person and his life, being present at the critical moment, when prompt action was necessary, found it to be his duty, a duty which he had no liberty to refuse to perform, to take the steps which resulted in Terry’s death. This duty was imposed on him by the section of the Revised Statutes which we have recited, in connection with the powers conferred by the state of California upon its peace officers, which become, by this statute, in proper cases, transferred as duties to the marshals of the United States.

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But all these questions being conceded, it is urged against the relief sought by this writ of habeas corpus, that the question of the guilt of the prisoner of the crime of murder is a question to be determined by the laws of California, and to be decided by its courts, and that there exists no power in the government of the United States to take away the prisoner from the custody of the proper authorities of the state of California and carry him before a judge of the court of the United States, and release him without a trial by jury according to the laws of the state of California. That the statute of the United States authorizes and directs such a proceeding and such a judgment in a case where the offense charged against the prisoner consists in an act done in pursuance of a law of the United States, and by virtue of its authority, and where the imprisonment of the party is in violation of the constitution and laws of the United States, is clear by its express language.

The enactments now found in the Revised Statutes of the United States on the subject of the writ of habeas corpus are the result of a long course of legislation, forced upon Congress by the attempt of the states of the Union to exercise the power of imprisonment over officers and other persons asserting rights under the federal government or foreign governments, which the states denied. The original act of Congress on the subject of the writ of habeas corpus, by its fourteenth section, authorized the judges and the courts of the United States, in the case of prisoners in jail or in custody under or by color of the authority of the United States, or committed for trial before some court of the same, or when necessary to be brought into court to testify, to issue the writ, and the judge or court before whom they were brought was directed to make inquiry into the cause of commitment. (1 Stats. 81, ch. 20, sec. 14.) This did not present the question, or, at least, it gave rise to no question which came before the courts, as to releasing by this writ parties held in custody under the laws of the states. But when, during the controversy growing out of the nullification laws of South Carolina, officers of the United States were arrested and imprisoned for the performance of their duties in collecting the revenue of the United States in that state, and

held by the state authorities, it became necessary for the Congress of the United States to take some action for their relief. Accordingly the act of Congress of March 2, 1833 (4 Stats. 634, ch. 57, sec. 7), among other remedies for such condition of affairs, provided, by its seventh section, that the federal judges should grant writs of habeas corpus in all cases of a prisoner in jail or confinement, where he should be committed or confined on or by any authority or law, for any act done, or omitted to be done, in pursuance of a law of the United States, or any order, process, or decree of any judge or court thereof.

The next extension of the circumstances on which a writ of habeas corpus might issue by the federal judges arose out of the celebrated *McLeod Case*, in which McLeod, charged with murder, in a state court of New York, had pleaded that he was a British subject, and that what he had done was under and by the authority of his government, and should be a matter of international adjustment, and that he was not subject to be tried by a court of New York under the laws of that state. The federal government acknowledged the force of this reasoning, and undertook to obtain from the government of the state of New York the release of the prisoner, but failed. He was, however, tried and acquitted, and afterwards released by the state of New York. This led to an extension of the powers of the federal judges under the writ of habeas corpus, by the act of August 29, 1842 (5 Stats. 539, ch. 257), entitled "An act to provide further remedial justice in the courts of the United States." It conferred upon them the power to issue a writ of habeas corpus in all cases where the prisoner claimed that the act for which he was held in custody was done under the sanction of any foreign power, and where the validity and effect of this plea depended upon the law of nations. In advocating the bill, which afterwards became a law, on this subject, Senator Berrien, who introduced it into the Senate, observed: "The object was to allow a foreigner, prosecuted in one of the states of the Union for an offense committed in that state, but which he pleads has been committed under authority of his own sovereign, or the authority of the law of nations, to be brought up on that issue before the only competent judicial

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power to decide upon matters involved in foreign relations or the law of nations. The plea must show that it has reference to the laws or treaties of the United States or the law of nations, and showing this, the writ of habeas corpus is awarded to try that issue. If it shall appear that the accused has a bar on the plea alleged, it is right and proper that he should not be delayed in prison awaiting the proceedings of the state jurisdiction on the preliminary issue of his plea at bar. If satisfied of the existence in fact and validity in law of the bar, the federal jurisdiction will have the power of administering prompt relief." No more forcible statement of the principle on which the law of the case now before us stands can be made.

The next extension of the powers of the court under the writ of habeas corpus was the act of February 5, 1867 (14 Stats. 385, ch. 28), and this contains the broad ground of the present Revised Statutes, under which the relief is sought in the case before us, and includes all cases of restraint of liberty in violation of the constitution or a law or treaty of the United States, and declares that "the said court or judge shall proceed in a summary way to determine the facts of the case, by hearing testimony and the arguments of the parties interested, and if it shall appear that the petitioner is deprived of his or her liberty in contravention of the constitution or laws of the United States, he or she shall forthwith be discharged and set at liberty."

It would seem as if the argument might close here. If the duty of the United States to protect its officers from violence, even to death, in discharge of the duties which its laws impose upon them, be established, and Congress has made the writ of habeas corpus one of the means by which this protection is made efficient, and if the facts of this case show that the prisoner was acting both under the authority of law, and the directions of his superior officers of the department of justice, we can see no reason why this writ should not be made to serve its purpose in the present case.

We have already cited such decisions of this court as are most important and directly in point, and there is a series of cases decided by the circuit and district courts to the same purport. Several of these arose out of proceedings under the fugi-

tive slave law, in which the marshal of the United States, while engaged in apprehending the fugitive slave with a view to returning him to his master in another state, was arrested by the authorities of the state. In many of these cases they made application to the judges of the United States for relief by the writ of habeas corpus, which give rise to several very interesting decisions on this subject.

In *Ex parte Jenkins*, 2 Wall. Jr. 521, 529, the marshal, who had been engaged, while executing a warrant, in arresting a fugitive, in a bloody encounter, was himself arrested under a warrant of a justice of the peace for assault with intent to kill, which makes the case very analogous to the one now under consideration. He presented to the circuit court of the United States for the Eastern District of Pennsylvania a petition for a writ of habeas corpus, which was heard before Mr. Justice Grier, who held that under the act of 1833, already referred to, the marshal was entitled to his discharge, because what he had done was in pursuance of and by the authority conferred upon him by the act of Congress concerning the rendition of fugitive slaves. He said: "The authority conferred on the judges of the United States by this act of Congress gives them all the power that any other court could exercise under the writ of habeas corpus, or gives them none at all. If under such a writ they may not discharge their officer when imprisoned 'by any authority' for an act done in pursuance of a law of the United States, it would be impossible to discover for what useful purpose the act was passed." It "was passed when a certain state of this Union had threatened to nullify acts of Congress, and to treat those as criminals who should attempt to execute them; and it was intended as a remedy against such state legislation."

This same matter was up again when the fugitive slave, Thomas, had the marshal arrested in a civil suit for an alleged assault and battery. He was carried before Judge Kane on another writ of habeas corpus and again released. (2 Wall. Jr. 531.) A third time the marshal, being indicted, was arrested on a bench warrant issued by the state court, and again brought before the circuit court of the United States by a writ of habeas

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corpus and discharged. Some remarks of Judge Kane on this occasion are very pertinent to the objections raised in the present case. He said (2 Wall. Jr. 543): "It has been urged that my order, if it shall withdraw the relators from the prosecution pending against them [in the state court], will in effect prevent their trial by jury at all, since there is no act of Congress under which they can be indicted for an abuse of process. It will not be an anomaly, however, if the action of this court shall interfere with the trial of these prisoners by a jury. Our constitutions secure that mode of trial as a right to the accused; but they nowhere recognize it as a right of the government, either state or federal, still less of an individual prosecutor. The action of a jury is overruled constantly by the granting of new trials after conviction. It is arrested by the entering of *nolle prosequis*, while the case is at bar. It is made ineffectual at any time by the discharge on habeas corpus. . . . And there is no harm in this. No one imagines that because a man is accused he must, therefore, of course, be tried. Public prosecutions are not devised for the purpose of indemnifying the wrongs of individuals, still less of retaliating upon them."

Many other decisions by the circuit and district courts, to the same purport, are to be found, among them the following: *Ex parte Robinson*, 6 McLean, 355; 4 Am. Law Reg. 617; *Roberts v. Jailor of Fayette County*, 2 Abb. U. S. 265; *In re Ramsey*, 2 Flip. 451; *In re Neill*, 8 Blatchf. 156; *Ex parte Bridges*, 2 Woods, 428; *Ex parte Royall*, 117 U. S. 241.

Similar language was used by Mr. Choate in the Senate of the United States upon the passage of the act of 1842. He said: "If you have the power to interpose after judgment, you have the power to do so before. If you can reverse a judgment, you can anticipate its rendition. If, within the constitution, your judicial power extends to these cases or these controversies, whether you take hold of the case or controversy at one stage or another, is totally immaterial. The single question submitted to the national tribunal, the question whether, under the statute adopting the law of nations, the prisoner is entitled to the exemption or immunity he claims, may as well be extracted from the entire case, and presented and decided in

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those tribunals before any judgment in the state court, as for it to be revised afterwards on a writ of error. Either way, they pass on no other question. Either way, they do not administer the criminal law of a state. In the one case as much as in the other, and no more, do they interfere with state judicial power.”

The same answer is given in the present case. To the objection made in argument, that the prisoner is discharged by this writ from the power of the state court to try him for the whole offense, the reply is, that if the prisoner is held in the state court to answer for an act which he was authorized to do by the law of the United States, which it was his duty to do as marshal of the United States, and if in doing that act he did no more than what was necessary and proper for him to do, he *cannot* be guilty of a crime under the law of the state of California. When these things are shown, it is established that he is innocent of any crime against the laws of the state, or of any other authority whatever. There is no occasion for any further trial in the state court, or in any court. The circuit court of the United States was as competent to ascertain these facts as any other tribunal, and it was not at all necessary that a jury should be impaneled to render a verdict on them. It is the exercise of a power common under all systems of criminal jurisprudence. There must always be a preliminary examination by a committing magistrate, or some similar authority, as to whether there is an offense to be submitted to a jury, and if this is submitted in the first instance to a grand jury, that is still not the right of trial by jury which is insisted on in the present argument.

We have thus given, in this case, a most attentive consideration to all the questions of law and fact which we have thought to be properly involved in it. We have felt it to be our duty to examine into the facts with a completeness justified by the importance of the case, as well as from the duty imposed upon us by the statute, which we think requires of us to place ourselves, as far as possible, in the place of the circuit court, and to examine the testimony and the arguments in it, and to dispose of the party as law and justice require.

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Points decided.

The result at which we have arrived upon this examination is, that in the protection of the person and the life of Mr. Justice Field while in the discharge of his official duties, Neagle was authorized to resist the attack of Terry upon him; that Neagle was correct in the belief that without prompt action on his part the assault of Terry upon the judge would have ended in the death of the latter; that such being his well-founded belief, he was justified in taking the life of Terry, as the only means of preventing the death of the man who was intended to be his victim; that in taking the life of Terry, under the circumstances, he was acting under the authority of the law of the United States, and was justified in so doing; and that he is not liable to answer in the courts of California on account of his part in that transaction.

We therefore affirm the judgment of the circuit court authorizing his discharge from the custody of the sheriff of San Joaquin County.

HEWITT v. STOREY ET AL.

CIRCUIT COURT, SOUTHERN DISTRICT OF CALIFORNIA.

SEPTEMBER 23, 1889.

1. CORPORATIONS — ACTIONS BY AND AGAINST. — The Code of Civil Procedure of California, section 388, provides that "when two or more persons, associated in any business, transact such business under a common name, whether it comprises the names of such persons or not, the associates may be sued by such common name." *Held*, that a bill to enjoin interference by defendants with complainant's alleged right to divert water from a stream, against the "South Fork and Sunnyside Division of the Santa Ana River," which, it appears, is an association formed and existing pursuant to the laws of California, is sufficient, without making the owners and stockholders thereof parties.

Before Ross, District Judge.

In equity. On bill and answer.

Messrs. Rowell & Rowell, and *Mr. John Albright* (*Mr. A. W. Thompson*, and *Messrs. Brousseau & Hatch*, of counsel), for complainant.

Messrs. Curtis & Otis, and *Mr. Byron Waters* (*Mr. R. E. Houghton*, of counsel), for defendants.

ROSS, J. Certain of the defendants to this suit having by amended answers objected to the amended bill of complaint that it is defective for want of parties, the cause was, on motion of complainant, set down for argument on those objections, pursuant to equity rule 52, and the objections, having been argued by the respective parties, are now to be determined. The purpose of the suit on complainant's part is to establish as against the defendants his alleged right to $333\frac{1}{3}$ inches of the water of the Santa Ana River, measured under a four-inch pressure, diverted at a certain specified point by means of a certain ditch, called the "Berry Roberts Ditch," and to obtain an injunction enjoining defendants from interfering therewith. To the original as well as the amended bill a large number of persons are made defendants, as also certain corporations, among them the North Fork Water Company, and a certain association, styled the "South Fork and Sunnyside Division of the Santa Ana River," which is sued as, and alleged to be, an association formed and existing pursuant to the laws of the state of California, and "composed of some or all of the aforesaid defendants and other persons unknown to your orator," and transacting business under that name in San Bernardino County, in which county the water in dispute is situated. The bill, as amended, alleges that on and after March 10, 1869, certain named persons, under and by virtue of the laws of the state of California, acquired by appropriation 500 inches of the water of the Santa Ana River, measured under a four-inch pressure, which they diverted at a certain named point by means of a certain ditch, known as the "Berry Roberts Ditch," and that the complainant subsequently acquired from those appropriators $333\frac{1}{3}$ inches of said water, measured under a like pressure, with the right to divert the same at the same point through the same ditch. The bill, as amended, further alleges that at the time of the construction of the Berry Roberts Ditch, and of the appropriation under which the complainant claims, the defendant corporation, the North Fork Water Company, or its predecessors in interest or grantors, and the defendant association, the South Fork and Sunnyside Division of the Santa Ana River, or its predecessors in interest or grantors, were the owners of two certain other

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ditches commencing in said river and conveying water therefrom, and were the only persons who had acquired any right to the use of the water of the Santa Ana River prior to the right of complainant and of those under whom he claims; that the rights of the said named defendants were acquired by them, or by their predecessors in interest, by prior appropriation, under and in pursuance of the same laws of the state of California, and extended only to the amount of 200 inches of water, measured under a four-inch pressure, for each of the last-named ditches. It is further alleged in said amended bill that the Santa Ana River is an unnavigable stream of running water, flowing through sundry wild canyons or ravines in the San Bernardino Mountains, and emerging therefrom into the San Bernardino valley through the mouth of a steep ravine at or near its eastern boundary; that from time immemorial the waters of the said river have been, and are now, for many miles above and below the head of the Berry Roberts Ditch, held and owned exclusively by right of appropriation, and used generally for the purpose of irrigation; that the land of the complainant lies in the said valley, and in common with certain lands of the defendants, is incapable of cultivation without water; that at certain dry seasons of the year the said river contains at and between the head of the Berry Roberts Ditch and the mouth of the ravine aforesaid little more than sufficient water to supply the above-mentioned prior appropriators and complainant with the quantity of water to which they are respectively entitled, but does at all times contain sufficient to supply the said prior appropriators and complainant to the extent of their respective rights.

The amended answers referred to herein, among other things, deny that the North Fork Water Company and the South Fork and Sunnyside Division of the Santa Ana River are only entitled to 200 inches each of the water of the Santa Ana River, but on the contrary, aver the said-named company and association to be entitled to the entire flow of the water of the river, measured at a point about two miles above the head of the Berry Roberts Ditch, and which water, it is averred, is owned by said company and association in equal proportions, and is in the aggregate greatly in excess of 1,000 inches, measured under a four-

inch pressure. And the said amended answers further aver that the amended bill is defective for want of proper parties defendant in this, that certain named persons and corporations, who now are, and at the time the original bill was filed were owners and shareholders in the South Fork and Sunnyside Division of the Santa Ana River, are not made parties defendant to said amended bill, and that certain other named persons who were made parties defendant to the original bill, and who were owners and shareholders in said South Fork and Sunnyside Division of the Santa Ana River, have died since said original bill was filed, and that their legal representatives, who now are owners and shareholders in said South Fork and Sunnyside Division of the Santa Ana River, are not made parties defendant to the amended bill.

This statement embraces such portions of the pleadings as are necessary to be stated for the determination of the point now made. The question is whether all of the owners and shareholders in the South Fork and Sunnyside Division of the Santa Ana River—which is alleged in the bill and admitted by the answers to be an association formed and existing pursuant to the laws of California, and transacting business under that name in the county of San Bernardino, where it has its place of business—are necessary parties to the suit. The circumstance that some of the persons made defendants are alleged to be shareholders in the association does not affect the question. The complainant, by his bill, does not seek to avail himself of the rule that applies where the parties are too numerous to be brought before the court, or where the question is one of common or general interest of many persons. The allegation that certain of the defendants are shareholders in the association may be disregarded, if it be true, as contended by complainant, that all of the shareholders are suable by the common name under which it is alleged and admitted they associated themselves and are doing business. In controversies concerning the title to real property the federal court always administers the law as if it was sitting as a local court of the state. (*Olcott v. Bynum*, 17 Wall. 57; *Slaughter v. Glenn*, 98 U. S. 244.) The nature of the property in controversy here is such as to make the same

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Points decided.

rule applicable. Now, by section 388 of the Code of Civil Procedure of California, it is provided that "when two or more persons, associated in any business, transact such business under a common name, whether it comprises the names of such persons or not, the associates may be sued by such common name, the summons in such cases being served on one or more of the associates; and the judgment in the action shall bind the joint property of all the associates in the same manner as if all had been named defendants, and had been sued upon their joint liability." In this case the association in question was sued by its common name, the South Fork and Sunnyside Division of the Santa Ana River, and as such appeared and answered, putting in issue the averments of the bill respecting its alleged interference with the complainant's rights, and respecting the quantity of the water of the Santa Ana River to which it is entitled. It is the acts of the association, as such, of which the complainant, among other things, complains, and it is the rights of the association, as such, that are, among other things, put in issue by the pleadings. A decree favorable to the association would inure to the benefit of all of its members, and one adverse to it would, in my judgment, bind all of them. Objections disallowed.

UNITED STATES v. SCOTT ET AL.

CIRCUIT COURT, NORTHERN DISTRICT OF CALIFORNIA.

SEPTEMBER 23, 1889.

1. PUBLIC LANDS — CUTTING TIMBER — PAYMENT FOR LAND. — A party prosecuted for cutting timber on the public lands under section 2461, Revised Statutes, is only relieved from the criminal prosecution and liabilities provided for in said section 2461 by payment of two dollars and a half per acre for the land on which it is cut; he is not relieved from his civil common-law liability to the United States as owner of the land for the value of the timber cut.

Before SAWYER, Circuit Judge, and SABIN, District Judge.

At law.

Mr. J. T. Carey, United States Attorney, for plaintiff.

Mr. J. J. Scrivner, and *Mr. R. T. Devlin*, for defendants.

By the Court, SAWYER, Circuit Judge. This is an action to recover twenty-six thousand and odd dollars, the value of lumber manufactured from timber cut on the public lands of the United States, described in the complaint. The third defense set out is, that, after the cutting of said timber, and manufacturing of it into lumber, the defendants were indicted for the offense of cutting the same timber under section 2461 of the Revised Statutes of the United States; that after said indictment, the defendants paid into the court in which it was pending, the sum of two dollars and a half per acre for all lands upon which said timber had been cut, and were, thereby, “relieved from *further* prosecution and liability therefor,” in pursuance of section 5 of the act of June 2, 1878, entitled “An act for the sale of timber lands in the state of California, Oregon, and Nevada, and in Washington territories.” (1 Sup. Rev. Stats. 329.) The United States moves to strike out this defense, as constituting no valid answer to the suit, and as being, therefore, irrelevant. On the part of the defendants it is claimed, that section 5 covers not only all criminal prosecutions, and relieves them “from further prosecutions and liability therefor,” incurred under section 2461, Revised Statutes, but that it exonerates and relieves them from all civil liability for the lumber cut, or for its value. The United States, on the other hand, claim, that they are only relieved from the penal liabilities incurred under said section 2461, and the question thus raised is the one to be now determined. Section 2461 makes it an offense against the United States to cut and destroy or remove timber from the public lands in the way alleged in the complaint; and provides that, “any person so cutting timber,” shall pay a fine not less than triple the value of the trees cut, or timber so destroyed, or removed, and shall be imprisoned not exceeding twelve months. There is, therefore, a criminal liability created which is to be prosecuted and punished by indictment—the penalty being both fine and imprisonment. Now what is the *subject-matter* of section 5 of the act of 1878? Manifestly, by the terms of the statute, persons prosecuted, and the liabilities for which they are prosecuted, “for violating section two thousand four hundred and sixty-one.” They are to

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be relieved from "further prosecution and liability," under said former section. It would be a strained construction to extend the section to other civil rights of the United States, not specifically, or at all, mentioned. The subject-matter of the provision seems, manifestly, limited to prosecutions under section 2461. When the timber is once severed from the land, it ceases to be a part of the realty, and becomes personal property, having no further relation to the realty whatever. But the title to the personal property is still in the United States. The property becomes subject to the laws that govern personal property. The relation of the parties to the property become changed. Under the case of *Wooden Ware Co. v. United States*, 106 U. S. 432, the United States can replevy the lumber or timber, wherever found, and if it cannot be found, and the cutting was knowingly and wilfully done, recover the full value of the lumber, or timber, with the enhanced value by reason of its manufacture, and carrying to market. Suppose in the case of timber cut prior to the act of 1878, in violation of section 2461, the United States had recovered the lumber or timber made, or its enhanced value, in an action of replevin, I apprehend, this would not have relieved the parties from the criminal liability and prosecution under the statute. The latter was an additional liability created for the protection of the timber on the public lands. So also, if the proceedings were reversed, and a conviction had, and punishment executed under the statute, I apprehend, that the party would not thereby be relieved from his civil liability, under the general law of the land, wholly independent of the statute. The United States would still own the lumber. The two liabilities are entirely independent of each other. They have no relation whatever to each other. So also, if since the passage of the act of 1878, the United States, under the rule established in *Wooden Ware Co. v. United States*, *supra*, should recover the lumber or timber, or its enhanced value after carried to market, this, I take it, would not, even now, relieve him from prosecution criminally under section 2461, Revised Statutes. If he should, upon such subsequent prosecution, pay into court two dollars and a half per acre as provided by section 5 of the act of 1878, it would hardly be contended, I think, that he

would be entitled to a credit for the amount already recovered by the United States for the value of the lumber. The value of the lumber recovered would, doubtless, in many cases, be ten times the amount of two dollars and a half per acre for the land on which it had been cut. If he would be entitled to a credit to the amount of two dollars and a half per acre, it would be upon the principle that the government authorizes him to buy all the timber there was on the land before it was denuded, after having been detected in his offense, and upon that theory the government when seeking to convict him should refund the full amount of its recovery in the civil suit, over the sum of two dollars and a half per acre. On this hypothesis, it would be a great advantage, instead of an inconvenience to the offender, to be prosecuted criminally instead of civilly. There is little land, I apprehend, that is worth being denuded of its timber, at all, for lumber or timber, upon which parties would not gladly pay two dollars and a half per acre for the right to cut it, provided it cannot be done on easier terms. But if as trespassers they can cut and destroy on larger tracts of lands, and only occasionally, *when detected and prosecuted, criminally*, secure immunity by paying two dollars and a half per acre for small portions of their depredations, they are not likely to trouble themselves much about consequences. On that hypothesis, on the general result, it would be much more profitable to unlawfully *take than to buy* the timber, even if it could be bought. Such a construction of the act of 1878 as is contended for by defendant, would hold out a large premium to trespassers to utterly denude the public lands of their most valuable timber. I do not think Congress in the act of 1878 contemplated any such absurd consequences.

I do not perceive that reversing the proceedings and indicting the party first, and beginning the civil action afterwards, would vary the rights of the parties. I am of the opinion that a payment in pursuance of section 5 of the act of 1878 does not discharge the party from liability other than that created by section 2461, Revised Statutes, and that the facts alleged in the third division of the answer constitute no defense, and that that defense should be stricken out as irrelevant. It is so ordered.

SABIN, J., dissenting.

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UNITED STATES *v.* DALLES MILITARY ROAD CO. ET AL.

CIRCUIT COURT, DISTRICT OF OREGON.

OCTOBER 7, 1889.

1. PUBLIC LANDS—GRANTS—DALLES MILITARY ROAD.—The act of Congress of February 25, 1867 (14 Stats. 409), granted to the state of Oregon lands to aid in the construction of a military wagon road from Dalles City to Fort Boise. Section 3 of the act provides that "said road shall be constructed with such width, gradation, and bridges as to permit of its regular use as a wagon road, and in such special manner as the state of Oregon may prescribe." By an act passed October 20, 1868, the state of Oregon transferred the grant to the Dalles Military Road Company, but prescribed no "special manner" for constructing the road. *Held*, that these two acts formed the entire statutory contract with the road company, and that the statute of Oregon of October, 14, 1862, relative to the construction of roads by private corporations, which had no reference to this specific road or grant, did not affect the question between the United States and the road company as to whether the latter had constructed the road in the manner and within the time as prescribed by the act of Congress.
2. *IDEM*.—There being nothing in either act requiring the road company, or any one claiming under it, to maintain the road after it had been once completed and accepted by the government in accordance with the provisions of the acts, without any such fraud as to vitiate the acceptance, its right to the lands against the United States vested irrevocably upon such acceptance.

Before SAWYER, Circuit Judge.

In equity. Bills to forfeit lands under the act of Congress approved March 2, 1889, entitled "An act providing in certain cases for the forfeiture of wagon-road grants in the state of Oregon." (25 Stats. 850.) On exceptions to portions of the bill for impertinence.

Mr. L. L. McArthur, United States Attorney, and *Mr. W. C. Johnson*, for plaintiff.

Mr. James K. Kelly, *Mr. C. S. Wood*, and *Messrs. Dolph & Bellinger*, for defendants.

SAWYER, Circuit Judge. The first paragraph of the bill sets out the substance of the act of Congress passed February 25, 1867, entitled "An act granting lands to the state of Oregon, to aid in the construction of a military wagon road from Dalles City, on the Columbia River, to Fort Boise, on the Snake River," found in 14 U. S. Stats. 409. The second paragraph in like manner sets out the substance of the statute of Oregon,

passed October 20, 1868, entitled "An act donating certain lands to Dalles Military Road Company," found in the statutes of Oregon for 1868, page 3. Notwithstanding these allegations in the second paragraph it is alleged in the third, "that the state of Oregon never, at any time, passed any laws whatsoever, for the specific purpose of carrying the act of Congress into effect," meaning only, it must be presumed, in view of the preceding allegations of the bill, that it never passed any law other than that set out, or any law prescribing any "other special manner" of constructing the road than that prescribed in the said act of Congress, as it was authorized to do by section 3 of that act. The bill then proceeds to aver: "But long before the passage of the act of Congress" the state legislature did pass "an act providing for private corporations, and the appropriation of private property therefor," which act provided, that any road constructed by such corporation should be constructed in a certain manner, of a certain width, etc., fully described in the act; also, for bridging and ferrying streams, with many other particulars, and that said act has been in force, at all times, since its passage on October 14, 1862. This passage is excepted to as impertinent, the said statute being, as contended, inapplicable, and having no relation to the road as constructed, or required to be constructed by defendant, the Dalles Company, under and in pursuance of the congressional grant to the state of Oregon, and the statute of Oregon, set out in the bill transferring the said grant to the Dalles Company upon the same "conditions and limitations" as in the act of Congress prescribed, and no others. I am satisfied, that this exception must be sustained. Section 3 of the act of Congress provides, "that said road shall be constructed with such width, gradation, and bridges, as to permit of its regular use as a wagon road, and in such special manner, as the state of Oregon may prescribe." Congress was providing for the construction of this particular road, and made no reference to any other road, or to any existing statute of Oregon. It does not say, in "such special manner" as the statutes of Oregon have heretofore provided "for roads constructed under its authority and laws," or "in such 'special manner' as the laws of Oregon now provide

for the construction of roads, toll or otherwise, by corporations or private parties,” but in such other “special manner as the state of Oregon may prescribe.” That is to say, may hereafter prescribe, when regranting the lands to aid in the construction of the road, or in hereafter contracting with parties to construct the road, either for the lands, or for a money consideration, to be paid in whole, or in part, out of the proceeds of the lands. The act of Congress, evidently, contemplates future, not past action—such “other special manner” as the state may prescribe for this particular road—not such as it has already, heretofore prescribed for other roads, toll or otherwise. This is the only limitation prescribed by Congress in this particular.

Upon examining the statute of Oregon, transferring the congressional grant to the Dalles Military Road Company, it will be seen that no “special manner” of constructing the road was therein prescribed, and the Dalles Company was not limited to any description of road to be constructed, other than that found in the act of Congress itself. The statute is a special, independent act, limited to the very object named in and contemplated by the act of Congress, and referring to no other road or object. In the preamble it recites the act of Congress *verbatim* in full, and then provides “that there is hereby granted to Dalles Military Road Company incorporated . . . all lands, right of way, rights, privileges, and immunities heretofore granted or pledged to this state by the act of Congress in this act heretofore recited, for the purpose of aiding said company in constructing the road mentioned and described in said act of Congress, upon the conditions and limitations therein prescribed.” (Laws 1868, p. 5.) There is no reference to any prior statute of Oregon, and no description at all of the road to be constructed by the defendant; no “special manner” prescribed, nothing except the description in the act of Congress itself. It simply adopts the provisions of that statute, and by that act the rights of the Dalles Company, so far as governing the land grant under the act of Congress is concerned, are entitled to be judged. This is special legislation relating to a single specific subject-matter, and we are not to import into it other conditions which the legislature has itself omitted to incorporate. As the

state of Oregon, in transferring the congressional grant of land to the defendant, in consideration of its building the road, did not prescribe any "special manner" in which it should be built, or any manner other than that prescribed by Congress itself, when the conditions prescribed by the act of Congress were performed within the time limited, the right to the lands became fully and irrevocably vested. The terms of the statutory contract between the state and the Dalles Company are found in the two acts—the act of Congress granting the lands to the state on the conditions alone prescribed in it, and the state act in express terms granting them to the Dalles Company upon precisely the same conditions and limitations, no others having been inserted. The act of the state of Oregon, without other conditions therein than those prescribed in the act of Congress, operated as a transfer or assignment to the company of the congressional grant without restriction, and it was only necessary for the company to perform those conditions, in order to become entitled to the lands. Prior legislation, therefore, upon a subject-matter, having no reference to this specific road, or this specific land grant, cannot affect the question between the United States and these defendants as to whether the road was constructed by the Dalles Company in the manner and within the time prescribed in the act of Congress, and the statute of Oregon strictly following the provisions of the act of Congress, without prescribing any further conditions. It may have been necessary for the Dalles Company to perform conditions enjoined by the statutes of Oregon, other than those prescribed by the acts now in question, in order to entitle it to enjoy other rights under other laws of Oregon. But if so, those conditions, and the independent rights acquired by their performance, are wholly outside of and foreign to this investigation, and with which we now have no concern. Our inquiry is limited to the requirements of the statutory contract set out. The first exception must, therefore, be sustained, the matter excepted to being impertinent to this inquiry.

The next exception is to the allegation relating to maintaining the road after construction, in case it was constructed in accordance with the act. The allegation is, that the road "was not,

and never has been, maintained as a public highway by either, or any of the defendants herein, or any person, or persons, claiming any interests in the lands embraced within the limits provided for by the said act of Congress." And the other exceptions all relate to similar allegations as to "maintaining the road" after construction, not to a failure to construct the road in accordance with the contract. It is contended that these allegations are impertinent, because the defendants, under the terms of the contract, embodied in the act of Congress and the act of the legislature of the state of Oregon, set out in the bill, were not under any obligation to maintain the road after it had been once constructed in accordance with the terms of the contract. And this view appears to me to be correct, so far as the vesting of the right of the defendant to the lands is concerned. I can find nothing in either act that requires the Dalles Company, or anybody holding under it, to maintain the road, after it has been once completed, in accordance with the terms of the statutory contract, and been approved and accepted by the government, through its agent, for that purpose duly appointed by the statute and contract, the parties acting in good faith, and there being no such fraud as should vitiate such approval and acceptance. The lands were granted in the words of the statute, "to aid in the construction" of the road. "The lands hereby granted shall be exclusively applied to the construction of said road, and to no other purpose." After the completion of ten miles a quantity of land, "not to exceed thirty sections, may be sold, and so on from time to time until said road shall be completed." There is nothing said in either act about maintaining the road after its completion. When the road has been completed, honestly approved, and accepted in accordance with the provisions of these two statutes, the contract has been fully executed on the part of the Dalles Company, and the contract having been fully performed, its right to the lands has irrevocably vested. The grant is *in præsenti*, and there is no provision for forfeiture in case the road is not afterwards maintained. It is provided that if the road is not "completed" within the time prescribed, no more lands shall be sold, and those "unsold shall revert to the United States." But no provision is made for their

forfeiture for not maintaining the road after completed. The contracting party, after completing the road in pursuance of the terms of the statute, might then abandon it and leave it to the state or the government, or whoever else may have an interest in it, either to take care of it, or allow it to go to destruction, so far as any rights, or liabilities under these two statutes are concerned. As well might one, who has contracted with a builder for the erection of a house upon certain specifications for a specified price, after the completion of the structure in accordance with the contract, and acceptance of the house, require the builder to ever after maintain it in repair.

It must be remembered that we are now, in this suit, dealing with the rights only of these parties—the United States and these defendants—arising out of this statutory contract for the construction of the road in question. If the Dalles Military Road Company, or any of these defendants, after the full performance of this statutory contract, and after their right to the land had fully vested under it, assumed to own and control this road, keep it as a toll-road, as to all parties other than the United States, or exercised any other rights under other statutes of the state of Oregon, or if any liabilities accrued to the United States, the state of Oregon, or to private parties, arising under other statutes, or laws of either the United States, or the state of Oregon, that is a matter wholly foreign to the inquiry now before the court. We are to deal simply with this statutory contract, and even in relation to that, which is the only thing we could under any circumstances, deal with, we are limited in our inquiry by the statute under which the suit is brought to three points:—

1. We are to determine the question of seasonable and proper completion of said roads in accordance with the terms of the granting acts, either in whole or in part—not according to the terms of other acts, state or national.

2. The legal effect of the several certificates of the governors of the state of Oregon of the completion of said roads and the right of resumption of said granted lands by the United States.

3. And we must determine these questions in a manner “saving and preserving the rights of *bona fide* purchasers of

either of said grants, or of any portion of said grants, for a valuable consideration.” (25 U. S. Stats. 851.)

There is nothing here said about “maintaining” the roads after construction. Manifestly, Congress in passing this act had no idea that the Dalles Company was required by either, or both the acts in question, to maintain the road after completion, in accordance with the statutory contract. We are only to deal with the statutory contract for constructing the roads, and ascertain whether the contract in that particular has been performed, wholly, or in part, and if not fully performed, what are the rights of the parties under the governor’s certificates, notwithstanding the failure to wholly, or in part, comply with the contract; and what are the rights of *bona fide* purchasers if these certificates can be, successfully, assailed, and disregarded, so far as participants in the fraud are concerned.

The case of *Schutz v. Military Road Co.* 7 Or. 264, has been confidently cited, as establishing a view different from that now adopted. In that case the question now under consideration was not, necessarily, or at all involved, and there was no occasion to determine whether the statutory contract was performed in such sense as to entitle the Dalles Company to the lands in question, or whether, under the two acts now in question, considered by themselves, said company was required to maintain the road after completion in accordance with these statutes alone. The instruction under discussion, in that case, may have been entirely correct, under the other general laws of Oregon, requiring parties who assume to own, or, at least, control and operate a public road for tolls collected, or other proper consideration. Liabilities may well accrue against such parties in favor of the United States, the state of Oregon, or private parties for their neglects or violations of duty. But if so, the liability in question did not result alone from a breach of the statutory contract, now under consideration, nor did the court so decide. The plaintiff was a private party, carrying the United States mail under a contract with the government. He did not sue on this statutory contract for a breach, either as an original party, or as assignee of the United States. The United States were in no sense parties to the suit. The suit was for a breach

of duty to maintain the road under the laws of Oregon, and the statutes in question were drawn in to show a right to use the road without charge. But if the court intended to assert, which I do not think it did, that this statutory contract alone required the Dalles Company to maintain this road after it had been completed according to the contract, and accepted, then I cannot concur in that view. That case might have been, indeed should have been, and it doubtless was, disposed of upon entirely different considerations, upon the rights of the parties arising out of an assumption on the part of the company to own and control the road, and to collect tolls thereon under other laws of Oregon. The right to collect tolls is a franchise granted only by the state. There was no such franchise granted by the acts in question. The case shows that it was decided in 1879, and arose many years after the road was required to be completed by the act of Congress of 1867 in question; that the defendant therein was a corporation organized under the laws of Oregon "for the purpose of constructing and maintaining" the road "and collecting tolls thereon" (*Schutz v. Military Road Co.* 7 Or. 259); "that it neglected to construct or maintain the road in accordance with the said acts of Congress and of the legislature of Oregon" (7 Or. 260); "and the answer admits the incorporation to build the road and collect tolls." (7 Or. 261.) Manifestly, then, the corporation was in the exercise and enjoyment of other franchises and different rights, than those derived under the acts of Congress and legislation of Oregon now in question, for neither of these acts makes any reference whatever to any such franchise or rights, and other laws of Oregon were properly before the court for consideration in that case, and, doubtless, it was upon those laws that the opinion of the court was predicated. There seems to be some confusion of ideas in the theory upon which the case was presented. The two acts now under consideration, constituting a statutory contract for the construction of this road, have no necessary connection with that case, except so far as to exempt the United States from tolls, unless by virtue of other statutes in nowise affecting the contract with which we are dealing, and the rights of the United States, and these defendants under it. That road might just as

well have been constructed under the acts in question by any other corporation, or private individual, had the grant been assigned to them, and having been completed and accepted, and the contractor having afterwards withdrawn, the Dalles Military Road Company might then have taken possession of the completed road, under other statutes of Oregon, and kept and maintained it as a toll-road, in the management of which many obligations and liabilities might have arisen, having no relation whatever to the acts and statutory contract for the mere construction of the road. There is no necessary connection whatever between this statutory contract and its performance, or non-performance, and the maintaining and operating of this road, as a toll-road, after its completion and acceptance, either by the parties constructing it or others; and the rights of the United States and the defendants under these specific statutes cannot in any way be affected by the arrangement between the state and the Dalles Company and its grantees made under other statutes, having no special reference to the construction of the road under the acts in question. The rights resting upon different statutes must stand or fall upon the statutes applicable to the specific subject-matter, and can neither be aided nor impaired by other acts having no relation to them. The one class should not be confounded with the other. Undoubtedly, this road, having been constructed under the act of Congress, the state could not impose or authorize others to impose tolls or other charges upon the United States, or prevent its use free from tolls or other charges by the government for the transportation of any property, troops, or mails. The supreme court of Oregon, therefore, might very properly have affirmed the correctness of the charge given in the case cited upon other statutes of Oregon, either alone or in conjunction with the act of Congress in question, without at all considering the questions now before the court, as to what is required to be done by the Dalles Company, by the statutory contract now under consideration, unaffected by other statutes. The questions in the two cases are entirely distinct, and should not be confounded.

Upon the views expressed all the exceptions to the bill for impertinence must be sustained, and it is so ordered.

UNITED STATES *v.* OREGON CENT. MILITARY ROAD CO.
ET AL.

CIRCUIT COURT, DISTRICT OF OREGON.

OCTOBER 7, 1889.

PER CURIAM. Similar questions are presented in this case, and the exceptions must be sustained upon the same grounds.

UNITED STATES *v.* EUREKA AND PALISADE RAILROAD
COMPANY.

CIRCUIT COURT, DISTRICT OF NEVADA.

NOVEMBER 23, 1889.

1. **TIMBER AND MINERAL LANDS—RAILROADS PROHIBITED FROM USING SAME.**—The defendant, a railroad corporation, purchased, for use upon its locomotives and cars, wood severed from the public mineral lands. *Held*, that such purchase and use was unlawful, and that the United States could recover from the defendant the value of the wood so severed, and purchased by it.

Before SABIN, District Judge,

Action at law. Replevin.

Mr. J. W. Witcher, United States Attorney, and *Mr. Henry Rives*, for plaintiff.

Messrs. Wren & Cheney, for defendant.

SABIN, J. This is an action of replevin brought by plaintiff to recover from defendant the possession of two thousand cords of pine, cedar, and mahogany wood, or the value thereof, alleged at the sum of ten thousand dollars, in case recovery of possession of said wood cannot be had.

The complaint alleges that said wood was severed from the public lands of plaintiff, in the state of Nevada, without the consent of plaintiff. That on or about December 1, 1888, at the county of Eureka, in said state, defendant wrongfully, unlawfully, and without plaintiff's consent took all of said

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wood from the possession of plaintiff, to its damage in said sum of ten thousand dollars.

The answer of defendant denies plaintiff's ownership of said wood, or that there was more than five hundred and fifty cords of the same; denies that it was severed from the public lands of the United States; denies that at the date alleged, or at any other time, defendant wrongfully, unlawfully, or without plaintiff's consent took all or any of said wood from the possession of plaintiff.

It alleges that defendant is operating its railroad, running from the town of Eureka to the town of Palisade, in said Eureka County, a distance of about eighty-five miles; that the wood used upon its locomotives was not cut by defendant, but the same was delivered to it by residents of the state, along the line of said road, for use upon its locomotives and in operating its railroad; denies that said wood was, or is, of any greater value than four dollars per cord.

The case was tried by the court without a jury.

The whole case is summed up in the findings of fact, which are as follows:—

I. "That the defendant is and was, at all the times mentioned in the complaint, a corporation duly organized and existing under and by virtue of the laws of the state of Nevada, and engaged in doing business as a common carrier exclusively in the county of Eureka, in said state. That on the first day of December, A. D. 1888, and for a long time prior thereto, the above-named plaintiffs were, ever since have been, and now are the owners of thirteen hundred cords of pine, cedar, and mahogany wood, which lies along the line, and within one hundred feet of the track of the Eureka and Palisade Railroad Company, in Eureka County, state of Nevada, between the towns of Eureka and Palisade, in said county, and at and between the various stations on said road between said towns, and which said wood was and is of the value of five thousand and two hundred dollars (\$5,200) in gold coin, of the government of the United States."

II. "Said wood was severed from the public land of the United States, which lands are situated within the state and

district of Nevada, and are unsurveyed and mineral in character, and not subject to entry, except for mineral entry; that said wood was so severed by *bona fide* residents of the state of Nevada, and by them sold to defendants.”

III. “That on or about the first day of December, A. D. 1888, at the county and state aforesaid, said defendant wrongfully, unlawfully, and without the consent of plaintiff took all of said wood into its possession, and now does wrongfully, unlawfully, and against the wishes of plaintiff withhold and detain from the possession of the plaintiff seven hundred and fifty (750) cords of said wood, of the value of four dollars (\$4.00) per cord, and there was seized at said time, under a writ of replevin in said action, five hundred and fifty cords of the wood described in the complaint, which said five hundred and fifty cords of wood is now in the possession of the United States marshal in and for said district. Said five hundred and fifty cords of wood is of the value of four dollars (\$4.00) per cord.”

IV. “That during all of the times mentioned in the complaint, the defendant owned and operated a railway between the towns of Eureka and Palisade, in said county and state, of about the length of eighty-five (85) miles; that during all of said times said railroad was largely engaged in the transportation of the gold, silver, and lead products of the Eureka and other adjacent mining districts to a market, and in transporting mining and other supplies in said region.”

V. “That at all of said times, all of the locomotives used upon said road were what is known as wood burners, and that a considerable quantity of wood is necessarily consumed in operating said locomotives.”

VI. “That said wood was cut from cedar trees of a length of from ten to twelve feet, including the branches, the bodies of which are from four to eight feet in length, and the largest of which do not exceed ten or twelve inches in diameter at the roots; that said trees are of a stunted, irregular growth, and unfit for timber, lumber, or manufacturing purposes; that said trees are valuable only for fire-wood and other domestic purposes; that said cedar trees and trees of nut-pine, and what is called mountain mahogany, of similar character and dimensions

as said cedar trees, comprise all the trees that grow upon said lands.”

These findings of fact are admitted to be correct, as shown by the evidence submitted.

Defendant seeks to justify its purchase and possession of said wood under an act of Congress, approved June 3, 1878. (20 U. S. Stats. p. 88, ch. 150.)

The first section of this act, and under which justification is sought, reads as follows:—

“That all citizens of the United States and other persons, *bona fide* residents of the state of Colorado, or Nevada, or either of the territories of New Mexico, Arizona, Utah, Wyoming, Dakota, Idaho, or Montana, and all other mineral districts of the United States, shall be, and are hereby, authorized and permitted to fell and remove, for building, agricultural, mining, or other domestic purposes, any timber or other trees growing or being on the public lands, said lands being mineral, and not subject to entry under existing laws of the United States, except for mineral entry, in either of said states, territories, or districts, of which such citizens or persons may be, at the time, *bona fide* residents, subject to such rules and regulations as the secretary of the interior may prescribe for the protection of the timber and of the undergrowth growing upon such lands, and for other purposes; *provided*, the provisions of this act shall not extend to railroad corporations.”

Unfortunately for the defendant, the proviso contained in the last lines of the section renders it impossible for the court to entertain this defense. The proviso is clear, certain, and unambiguous. There is no place for interpretation or construction as to its meaning. It means just what it says, “the provisions of this act *shall not* extend to railroad corporations.” No exceptions are made. It applies to all alike, and it must be enforced against all alike.

If this defendant can, under this act, purchase and use this wood and timber, in like manner can every other railroad in the state do so.

There are within the limits of the state nearly, or quite, nine hundred miles of railroads, to wit, the Central Pacific, four

hundred and forty-eight miles; the Eureka and Palisade, eighty-five miles; the Nevada and Oregon, twenty-eight miles; the Virginia and Truckee, fifty-two miles; the Carson and Colorado, one hundred and ninety-two miles; the Nevada Central, ninety-three miles. There are other projected lines of road which may be built in the near future. If any one of these companies can, under this act, obtain its supply of fuel from the public lands of the United States, then all can; and it matters not whether the lands are mineral or non-mineral lands from which the fuel is severed.

This act, the first section of which is above quoted, originated in the Senate. The discussion of the bill in the Senate was thorough and animated.

The bill passed that body and went to the House of Representatives. There it was amended in some respects, and among others, by the addition of the proviso above quoted. This amendment was adopted in the house without discussion. The bill was returned to the Senate, and there the amendment was accepted and adopted without debate. (Cong. Rec. 45th Cong. 2d Sess. vol. 8, pt. 4, pp. 3328, 3450.) This shows the unanimity of Congress on this subject. The proviso had only to be suggested to be adopted by both houses without debate. It is the duty of the courts to enforce this statute without equivocation. Without positive license by statute, or other competent authority, no person or corporation can lawfully cut or use the timber cut upon the public lands, be they mineral lands or otherwise.

The United States as proprietor of the public lands may call upon the courts by injunction, and by all other appropriate remedies, to stay and prevent waste and spoilation of the public domain, and to enforce any statutes, penal or other, enacted for that purpose.

The policy of this amendment or proviso, its seeming hardship upon railroads, is pressed upon the attention of the court.

The policy of a statute, its severity, or hardship, or inconvenience, is a matter for the consideration of Congress, not of the courts. Courts are to enforce laws, not make them; to execute, not avoid them.

I am not, however, inclined to question the wisdom and prudence of this proviso to this statute.

The supply of timber, even for fuel, in Nevada, is limited and not evenly distributed. The consumption of fuel by railroads is large and constant. If they are permitted to denude the public lands of the fuel thereon, the act of Congress referred to becomes of little benefit to the people of the state, and the result would be that the railroads, and the people also, residents of the state, would, ere long, be compelled to seek their fuel supplies from abroad and beyond the limits of the state. This would be very oppressive to the great mass of the people of the state.

It is, however, not a difficult matter for the railroad companies, having their own ample means of transportation, to procure their fuel supplies from lawful sources.

This timber and wood mentioned in the statute is, by the statute, devoted to the lawful uses of the people, *bona fide* residents of the state, to aid in the material development of the various industries of the state. The statute is beneficent in its purpose and object, but from its benefits all railroads are excluded.

It may be a serious question if those persons that cut this wood upon the public lands, and sold and delivered it to the defendant, are not subject to criminal prosecution for so doing.

It was not cut by them for a lawful purpose. It was cut in defiance of the statute, unlawfully and wrongfully, and in so cutting and removing it they acquired no title thereto as against the rightful owner, the United States. And the defendant, in purchasing this wood from parties having no lawful title thereto, acquired no title that can be maintained against the rightful owner, the plaintiff in this action.

Judgment must be entered for the plaintiff for the recovery of the possession of thirteen hundred cords of wood mentioned in the complaint, or for the value thereof, in case delivery of possession cannot be had, at the sum of four dollars per cord, amounting in the aggregate to the sum of five thousand two hundred dollars, lawful money, and for costs, and it is so ordered.

UNITED STATES v. RICHMOND MINING COMPANY OF NEVADA.

CIRCUIT COURT, DISTRICT OF NEVADA.

NOVEMBER 23, 1889.

1. **MINERAL LANDS—RIGHT TO USE TIMBER CUT AND REMOVED THEREFROM.**—The defendant, a corporation, engaged in mining, reducing ores, and refining bullion, purchased wood and charcoal for use at its reduction works. The cord-wood, and the wood from which the charcoal was manufactured, was cut upon unsurveyed public lands, mineral in character, of little or no value, except for the mineral therein, and within organized mining districts, or not far remote from known mines. *Held*, that this was mineral land within the meaning of the act of Congress of June 3, 1878, permitting timber to be taken therefrom for "building, agricultural, mining, or other domestic purposes," and that defendant could lawfully purchase such wood and coal, for said use, under the license given by said act.

Before SABIN, District Judge.

At law. Replevin.

Mr. J. W. Whitcher, United States Attorney, and *Mr. Henry Rives*, for plaintiff.

Messrs. Wren & Cheney, for defendant.

SABIN, J. This is an action of replevin, brought by plaintiff to recover from the defendant the possession of ten thousand bushels of charcoal, of the alleged value of eighteen hundred dollars, and three hundred cords of wood, of the alleged value of two thousand one hundred dollars, the same being at the yard and premises of the defendant, at the town of Eureka, in this state.

The complaint alleges that said coal was manufactured from wood cut and removed from the unsurveyed public timber lands of plaintiff, within said state, and that said three hundred cords of wood were cut and removed from said lands, and also cut and removed unlawfully and without the consent of plaintiff, and that plaintiff is now the owner thereof.

Plaintiff demands judgment for the recovery of the possession of said coal and wood, or for the value thereof, in the sum of three thousand nine hundred dollars, if recovery of possession cannot be had.

The answer of defendant denies that plaintiff is the owner of said personal property; denies that said wood was cut from the lands mentioned in the complaint; denies that defendant wrongfully or unlawfully, or without plaintiff's consent, took possession of said property, or wrongfully or unlawfully withholds possession of the same, or any part thereof, from plaintiff.

The case was tried before the court without a jury.

The findings of fact, upon the evidence submitted, are brief, and as follows:—

I. "That the defendant, the Richmond Mining Company of Nevada, is a corporation, duly organized and existing under and by virtue of the laws of the state of Nevada, engaged in the business of mining, purchasing and reducing ores, and separating gold and silver from lead, in the town and county of Eureka, state aforesaid, and was such corporation and so engaged at the time of, and long prior to, the commencement of this action."

II. "That at the time of the commencement of this action said defendant was in possession of sixteen cords of wood, of the value of six dollars per cord, and seven thousand bushels of charcoal, of the value of twenty-one cents per bushel, at its works in said town; and that said wood, and the wood from which said charcoal was manufactured, was cut upon the unsurveyed mineral lands of the United States, not subject to entry under any existing law of the United States, except for mineral entry; and that said wood was cut and said charcoal was burned by *bona fide* residents of the said state, for use in the said county, and sold to said defendant for use in carrying on its said business in said town, at a distance of about three miles from its mines."

III. "That the trees from which said wood was cut were a species of scrubby nut-pine, cedar, and what is locally called mountain mahogany, about ten or twelve feet in height, on an average, with bodies from four to eight feet in length, and less than twelve inches in diameter, and unfit for manufacture into either lumber or timber."

I believe the correctness of these findings is not questioned by either party.

The defendant justifies its purchase and possession of said coal and wood under the provisions of an act of Congress, approved June 3, 1878. (20 U. S. Stats. p. 88, ch. 150.)

The section of said act under consideration reads as follows: "That all citizens of the United States and other persons, *bona fide* residents of the state of Colorado or Nevada, or either of the territories of New Mexico, Arizona, Utah, Wyoming, Dakota, Idaho, or Montana, and all other mineral districts of the United States, shall be, and are hereby, authorized and permitted to fell and remove, for building, agricultural, mining, or other domestic purposes, any timber or other trees growing or being on the public lands, said lands being mineral, and not subject to entry under existing laws of the United States, except for mineral entry, in either of said states, territories, or districts, of which such citizens or persons may be at the time *bona fide* residents, subject to such rules and regulations as the secretary of the interior may prescribe for the protection of the timber and of the undergrowth growing upon such lands, and for other purposes; *provided*, the provisions of this act shall not extend to railroad corporations."

From the findings of fact, as above set forth, it would seem that defendant's justification of the purchase and possession of this coal and wood is complete. It was shown in evidence, and admitted, that the land upon which all of this wood was cut and removed was and is unsurveyed public land of plaintiff.

A large number of witnesses were examined as to the character of this land, whether mineral or not, and whether more valuable for the timber or wood thereon than for known mines. The witnesses differed in their judgment as to the character of this land, or at least as to the particular limited part thereof, the *locus in quo*, from which this wood had been removed. On this point, the most of the witnesses for plaintiff were teamsters, or men engaged in cutting, hauling, or furnishing wood or coal to those desiring to purchase it. Their evidence, generally, was to the effect that, upon the particular tracts of land, upon the hills or mountains, whence this wood had been removed, they had never seen any well-known mines, nor had they observed marked or well-defined traces of mineral-bearing ledges.

By their own evidence it appeared that they were not looking for mines or ledges, not interested especially in them, and their observation was only the most cursory. They were in no wise skilled in discovering or noting mineral signs and traces, and it would have been purely accidental had any of them, in walking over or along a rich ledge, discovered its existence, or discerned that it might be valuable. I do not question the integrity or truthfulness of any of these witnesses. I doubt not they were honest, and testified to matters as they saw them—or rather did *not* see them. The value of negative evidence is often slight. It is often unsatisfactory, unless it be shown that the witness possessed thorough knowledge of the subject; that he had ample field for observation; and that his attention was closely called to the matter under discussion. None of these conditions obtain as to these witnesses.

On the part of the defense it was shown that this wood was cut, if not wholly within the limits of an organized “mining district,” yet certainly adjacent thereto, and much of it not far from known and recognized mines, and all within what is commonly known and recognized as a mineral region—a tract of country where mines have been found, and may be sought for with reasonable hope of success.

It was shown that, beginning at or near the town of Palisade, in this state, a range of mountains extends in a southerly direction for at least one hundred and fifty miles; that this range bears mineral nearly its whole length; that it has been prospected over for the past twenty years, and is being constantly prospected for mines, and that new discoveries are being made; that between Palisade and the town of Eureka, a distance of about ninety miles, eight or ten or more mining districts have been organized, in all of which mines of value have been found; that many of these mining districts are contiguous, and cover nearly all of the distance between the two towns named; that these mining districts extend south from Eureka for a distance of from sixty to seventy miles, in many of which rich mines have been found.

The United States topographical surveys confirm this evidence. This mountain range is intersected in some places by

low passes and valleys, and different parts of it have local names; but it virtually constitutes a continuous range, though broken in places, on which mines of great value have been found, and doubtless others remain to be found. It is one of the richest mining belts or zones in the state. The Eureka mining district alone is reported to have produced between eighty and ninety millions of dollars since its discovery, and large mining operations are still going on there. Upon this mountain range and upon the foot-hills adjacent thereto is found the timber or trees of the character and quality mentioned in the findings of fact above set forth. It was upon this mountain range and upon the foot-hills adjacent that the wood in controversy was cut, and much of it within the limits of organized mining districts, and not far remote from known mines. It can hardly be questioned or doubted that the land upon which this wood was cut is properly classified and recognized as mineral land, and strictly within the purview of the act of Congress above cited.

This land has no value except for its minerals. It is mountainous, or broken foot-hills, with no soil, and not capable of cultivation. The wood growing thereon is fit only for domestic use; it has no value as timber to be made into lumber. It is the discovery and opening and working of mines that creates a demand for this timber or wood. The test of the land department as to whether a timber or mineral entry should be allowed, to wit, "which is the land most valuable for, its timber or known mines," does not apply in cases like the one before us. The test is very proper in the cases where it is used as applied to a limited tract of land. But as applied to a large tract of land, extending, as this mineral range does, for hundreds of miles, it has no application, for the land has no value for its wood or anything else until the discovery and opening of mines creates a market and gives a value to the wood. During the twenty-five years that Nevada has been a state none of this land has been surveyed, except in isolated places in the valleys. It will not be contended that the benefits of the statutes are limited to the use of the wood or timber growing upon *known* mining claims. Such a construction would wholly defeat the

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Opinion of the Court — Sabin, J.

object and purpose of the statute, since such timber or wood belongs to the owner of the claim.

It is urged with some earnestness, that, as it is shown this wood and coal were to be used in the reduction of ores and refining the product thereof, such an use is not a mining use properly. That reducing ores by mill or furnace process, and refining the bullion, is not a part of mining. If not properly a part of mining, it certainly is incident to it, and closely connected with it. In a very restricted sense it may be true that mining is limited to the breaking down or digging up of ore in place.

In its ordinary and usual sense mining embraces many things connected therewith, and it calls to its aid the services of many classes of persons not at all skilled in, or wholly ignorant of the manual labor of mining. But not to dwell upon this point, we may concede that reducing ores and refining the product may not be strictly mining. Still, this business by itself is a domestic industry of the highest importance to the miner and to the public.

Without reduction works it would profit the miner or the public but little to mine the ore. Reducing ores is certainly a lawful pursuit or business, and those engaged in it within the state are within the benefits conferred by the statute, and entitled to use this wood or timber for this purpose. The miner is not the only person benefited by the statute. It applies to all alike who use this wood or timber for domestic or local use within the state. And it matters not whether such reduction works, mills, or furnaces are engaged in reducing ores from mines owned by the proprietors of the works, or are engaged in reducing purchased ores, or in what is usually called custom work, for pay, toll, or tribute, from the owner of the ores reduced. All industries within the state not prohibited from such use are within the protection of the statute.

I have, therefore, no doubt, under the evidence of this case, but that the defendant had full right to purchase this coal and wood and use the same at its reduction works, and that the statute above cited is a complete defense to this action.

It follows, therefore, that judgment must be entered for the defendant, and it is so ordered.

A. M. SIMPSON ET AL. v. THE STEAMSHIP STATE OF CALIFORNIA, ETC., AND PACIFIC COAST STEAMSHIP CO. v. THE BARKENTINE PORTLAND, ETC. (A. M. SIMPSON ET AL., CLAIMANTS).

DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA.

NOVEMBER 27, 1889.

1. COLLISION. — Failure to show a sufficient red light is negligence.

Before HOFFMAN, District Judge.

Mr. Edward W. McGraw, for A. M. Simpson *et al.*

Messrs. McAllister & Bergin, for steamship State of California.

HOFFMAN, J. On the morning of April 7, 1886, a little after four o'clock A. M., a collision occurred between the steamship State of California and the barkentine Portland, a short distance from the entrance to this port.

The night was dark but clear. The Point Bonita, Point Reyes, and Fort Point lights were plainly visible. Each vessel was perfectly apprised of her position. They were bound in. The steamer was pursuing her direct and usual course toward the entrance of the harbor.

The barkentine had, some hours before the accident, tacked, and was standing off on a course to the westward of north, probably waiting for daylight before entering the harbor. The wind was northeast, or perhaps a little to the northward of that point. Her course was about north by west. She was therefore close hauled on her starboard tack. The course of the steamer was a little to the northward of east by north.

The vessels were thus approaching each other on courses which were not far from at right angles to one another. The steamer was struck by the barkentine on the starboard side abaft the beam, while endeavoring to cross the bows of the latter.

It is obvious that, if the lights required by law had been displayed by the vessels, and if they had been navigated with ordi-

nary skill and care, no collision could have taken place. One or both of the vessels must, therefore, have been in fault.

The proofs are very voluminous. I have examined and considered them with the more care, as the United States local inspectors and the supervising inspector appear to have differed in opinion as to the vessel to which responsibility for the accident should attach. I think the solution of this question will depend upon the answer to be given to a single inquiry. Did the barkentine display her red light in such a condition as to brightness, and at such a time before the collision, as would have enabled the steamer with proper diligence to have avoided the accident?

As to the steamer's lights, there is no dispute. These were of more than ordinary size and brilliancy. Her white head light was seen and recognized by the barkentine at least fifteen minutes before the collision, and when she was several miles distant. A few minutes afterwards her green light was observed, and subsequently, and just before the collision, her red, and even her saloon lights became visible. The witnesses on the part of the barkentine unanimously declare that the lights on board of her were burning brightly; but of these, three men were below up to the moment of the collision. They were roused by the shouting of the men on deck, when the steamer was close upon them.

If the barkentine's lights were properly constructed and set, and burning brightly, the steamer must have been guilty of gross and inexcusable negligence in failing to see the red light, and to alter her course accordingly. If, on the other hand, the barkentine's red light did not become visible until too late to avoid the collision, the steamer is blameless.

The night was sufficiently clear to permit the harbor lights to be distinctly seen, and even the steamer's head light, at a distance of three or four miles. If the barkentine's red light was not seen by the steamer in time to avoid the collision, it must have been because it was not set, or was dim, or else because the steamer failed to exercise proper diligence.

The testimony being irreconcilably conflicting, we are driven to attempt to arrive at the truth by an estimate of probabilities.

It is the well-known and, I believe, invariable practice of the commanders of the large passenger steamers on this coast, to station themselves on the bridges of these vessels, when entering the harbor, and to remain there until extraordinary diligence becomes unnecessary.

Captain Declney, the master of the State of California, a skillful and experienced officer, was accordingly on the bridge from the time Point Bonita light was made until the moment of collision. The second mate, the officer of the deck, was with him, and a lookout was duly stationed forward. That they were vigilant may be inferred from the fact that a sail on the starboard bow was discovered and reported; but no light could be detected. Captain Declney, therefore, concluded that the vessel was bound in on a course not far from parallel to his own. He therefore kept on his course. It was not, he says, until a minute before the collision, and when too late to avoid it, that he saw a dim red light, which apprised him that the vessels were steering on converging courses.

On board of the barkentine, the only persons on deck were the mate (Peterson) and three men, two of them Russian Fins and a third named Mullane.

It may seem a little singular and inconsistent with the habitual heedlessness of seamen before the mast, that they were all careful to observe, and are now able to testify that the lights were burning brightly. But if, as they say, they directed their attention to their own lights after the steamer's head light was observed, their doing so was, perhaps, not unnatural. But it is more singular that all those who were below, and rushed on deck at the very moment of the collision, and when the vessel had been so injured that she would have sunk had she not been lumber-laden, also directed their attention to the lights, and are prepared to swear positively that they were burning brightly.

There are some points in the mate's deposition which deserve attention. He states that he observed that the red light was burning dimly. He therefore took it down, and into the cabin and pantry, where he trimmed the wick, wiped off the glass, and replaced the light. It is remarkable that no one of the crew observed this important incident, or, if they did, they have

not mentioned it. Peterson testifies that it occurred more than an hour before the collision. But he seems to have made a statement or declaration, which was reduced to writing at Hull, England, to the effect that the collision occurred "at 3:35 by our clock"; and that he took the light down "after three o'clock." He adds, in the same statement, that he took down the light after the steamer's green light appeared. In his deposition taken in this suit, he testifies that his declaration at Hull was incorrect, or incorrectly taken down, and that, in fact, he trimmed and replaced the light long before the steamer's lights were discovered.

Which of these statements is true, it is impossible to determine with certainty. If it be true that he took the light down after the steamer's green light became visible, and he was occupied in trimming, wiping it off, and resetting it some eight or ten minutes, as seems not unlikely, the failure of the steamer to observe it during the brief but critical interval in which she could have altered her course or stopped and backed is explained. The omission of the other witnesses to make any mention of the fact is significant, if not suspicious.

One other circumstance, though of no great importance, deserves mention, as it seems to indicate carelessness or laxity of discipline on the part of the barkentine. From the moment the steamer's head light was discovered it must have been apparent to the mate of the barkentine that the steamer was bound in, and that the two vessels were on converging courses which might bring them together. And yet the master of the barkentine was suffered to sleep undisturbed in his cabin, and was only aroused by the shouting of the men when the collision was imminent and inevitable. The lights of the barkentine are stated to have been the customary regulation lights. But neither they nor similar ones are produced in court to establish beyond controversy their sufficiency.

The foregoing is, I believe, a correct summary of the testimony bearing on the controverted point on which the decision of the cause must turn. Its solution depends, as before observed, upon an estimate of probabilities. Which is the more likely? That the red light was taken down by Peterson to be

trimmed after the green light of the steamer came in view, as he is said to have stated in his declaration at Hull, or that for some other reason the light was burning dimly; or, on the other hand, that it was burning brightly, and that the master and mate of the steamer, and especially the former, after being apprised of the proximity of a sailing vessel, were so negligent as to fail to discern the plainly visible red light of an approaching vessel, which it was the principal business of the master, when he took his station on the bridge, to look out for and detect at the earliest moment.

It may be that the captain and mate were so impressed with the idea that the course of the vessel, whose sail they had discovered, was parallel to their own, that they paid no further attention to her. But they were accurately apprised of their position. The harbor lights were all visible, and there was nothing to divert their attention from the only object from which danger could be apprehended. If, on this occasion, the master failed to closely watch for the lights of the barkentine, he was guilty of gross, and I must think, unpardonable negligence.

After mature consideration, I have reached the conclusion that the steamer failed to see the red light of the barkentine, because it was either not displayed or was burning dimly. One or two minor points remain to be noticed. It was suggested that the steamer should have moderated her speed, when the sail of the barkentine was descried. But the red light of the latter was not then visible, and the steamer was justified in supposing that the vessels were sailing on nearly parallel courses and were not approaching each other. It is only in the latter case that the regulations required her to moderate her speed.

It is further claimed that, when the steamer did discover the red light of the barkentine, she should have stopped and backed, or altered her course so as to avert the collision. But the red light was not visible until, as Captain Debney swears, about a minute before the accident.

If I am right in supposing that the red light was not previously visible through the fault of the barkentine the captain of the steamer was, by that fault, placed *in extremis*, and is not responsible if he failed to adopt measures which might possi-

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Points decided.

bly have prevented the accident. His judgment, at the time, was that his only hope of avoiding the collision lay in holding his course and endeavoring to cross the bows of the barkentine. In this he very nearly succeeded. The barkentine struck him abaft his beam. Had the steamer gone less than half her length further, the vessels would have gone clear of each other.

It is impossible to affirm that any other course would have been more judicious or have afforded greater chances of escape. At all events, he exercised his best judgment in an emergency not due to his own fault; and this is all that the law requires.

FRANCOEUR v. NEWHOUSE.

CIRCUIT COURT, NORTHERN DISTRICT OF CALIFORNIA.

DECEMBER 9, 1889.

1. PUBLIC LANDS—GRANT TO CENTRAL PACIFIC RAILROAD COMPANY—GRANT IN PRÆSENTI. —The grant of lands to the Central Pacific Railroad Company to aid in the construction of its road, under the act of Congress of August 2, 1862, and the amendatory act of 1864, is a grant *in præsentî*, which can only be defeated by the failure to perform the conditions subsequent and appropriate proceedings to declare a forfeiture.
2. IDEM—EJECTMENT BEFORE PATENT ISSUES. —The title which vests under the congressional grant, and the performance of the prescribed conditions, is a legal title, upon which an action of ejectment may be maintained before the patent issues.
3. IDEM—OFFICE OF PATENT. —The patent issued under the congressional grant is only a convenient instrument of evidence that the conditions have been performed and the title vested.
4. IDEM—FAILURE TO PAY EXPENSE OF SURVEY. —The failure to pay the expense of surveying, under section 21 of the act of 1864, only prevents the issue of the patent. It does not prevent the title attaching under the congressional grant.
5. IDEM—EXCEPTION OF MINERAL LANDS. —The exception of mineral lands from the grant to the Central Pacific Railroad Company only extends to lands known to be mineral, or apparently mineral, at the time when the grant attached; and a discovery of a gold mine in the lands after the title has vested by full performance of the conditions, does not defeat the title.
6. IDEM—UNAUTHORIZED EXCEPTION IN PATENT. —An exception inserted in a patent, which is not authorized by the statute to be inserted, is void.
7. IDEM—PATENT FOR LANDS ALREADY GRANTED—COLLATERAL ATTACK. —When a patent is issued for land which has been before granted to other parties, and there is no interest left in the government to grant, the interior department acts without jurisdiction, there being nothing in the United States to grant, and the patent so issued is void, and may be collaterally impeached.
8. IDEM—RIGHTS OF TRESPASSERS. —When land has been granted to private parties, other parties have no right afterwards to enter upon the land and prospect for gold. No right can be initiated by a trespass upon private lands.

Statement of Facts.

[December,

Before SAWYER, Circuit Judge, and SABIN, District Judge.

At law.

This is an action to recover possession of lot 52 of section 13, township 17 north, of range 11 east, Mt. Diablo meridian. The plaintiff claims title by conveyance from the Central Pacific Railroad Company. It is alleged in the complaint that the land is part of an odd-numbered section lying within the ten-mile limit of the grant made to the Central Pacific Railroad Company, to aid in the construction of a railroad, by the act of Congress passed July 1, 1862 (12 Stats. 489); that the said corporation filed its assent to said act, and a map designating the general route of said railroad, with the secretary of the interior within two months after the passage of the act; that on August 2, 1862, the secretary of the interior caused all the lands within fifteen miles of said route, including the land in question, to be withdrawn from pre-emption, private entry, and sale; that the line of said road was definitely fixed, said road fully constructed and accepted by the President, from the western terminus, to a point more than twenty-five miles east of the township in which said land is situated, prior to September 29, 1866, and the whole of said road was definitely located, constructed, accepted by the President, and in operation to the east line of the state prior to July 2, 1868; that in the year 1866 the secretary of the interior caused all the lands in said township 17 north to be surveyed, and on March 2, 1867, the United States surveyor-general made return of the official plat of said survey, and filed the same in the general land office at Washington, on June 2, 1867, and the same was soon after regularly filed in the local land office at Marysville, that being the district in which said land was situated; "that by said survey the description of all lands in said township was ascertained, and the character thereof determined to be agricultural lands, and not mineral or swamp in character, nor covered by any governmental reservation; that the plats filed as aforesaid, so reported and showed the said lands, and that said determination, report, and showing have continually remained, and still remain, of full force and effect;" that said section 13,

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township 17, is within the limits of five miles of said railroad, along the line thereof, and, with other lands, was granted to said Central Pacific Railroad Company of California by said act of Congress; that at the date of the passage of said act of Congress, at the date when said line of said railroad was definitely fixed, and at the date when the said railroad was actually constructed through and beyond said township, all of said section 13 was returned as agricultural land, and no part of the same was known mineral land, or returned or denominated as mineral land, nor had any part of the same been sold, reserved, or otherwise disposed of by the United States, nor had any pre-emption or homestead claim attached to the same; nor was any part of said land within any exception from said grant; nor did the granting thereof to said company defeat or impair any pre-emption, homestead, or swamp, or other lawful claim to the same, or to any part thereof.

That during the year 1883 a vein or lode of quartz bearing gold, in paying quantities, was discovered within lot 53 of section 13, the premises in question; that on April 20, 1885, the Eagle Gold Mining Company filed in the proper office its application for a patent to said lot 53, from the United States, under the mining laws passed by Congress; that on May 5, 1887, pursuant to said application, the land department issued to said Eagle Gold Mining Company a patent to said lot 53, as the Eagle Bird Quartz Mine. That said application was made and patent issued without authority of law, and said patent is void, and that said defendant is in possession, claiming under said patent through mesne conveyances from said patentee.

That the Central Pacific Railroad Company has tendered to the treasury the amount of money required by the statute, and demanded a patent, but it has been refused, although all acts required by the law to entitle it to a patent have been fully performed, and the title to said premises has vested in it.

Mr. A. L. Hart, and George H. Francoeur, for plaintiff.

Messrs. Reinstein & Eisner, and James M. Sewell, for defendant.

By the Court, SAWYER, Circuit Judge (*after stating the facts as above*). It has been so often decided that the grant to the railroad company under this, and similar acts, is a grant *in præ-senti*, passing and vesting a present title, only to be defeated by a failure to perform the conditions subsequent, and suitable proceedings on the part of the United States, to forfeit them, that it is only necessary to cite the authorities without further discussing the question. (*Missouri etc. Ry. Co. v. Kansas Pac. Ry. Co.* 97 U. S. 496; *Schulenberg v. Harriman*, 21 Wall. 44; *Van Wyck v. Knerales*, 106 U. S. 360.) “‘There be and is hereby granted’ are words of absolute donation, and import a grant *in præ-senti*. This court has held that they can have no other meaning.” (*Leavenworth etc. R. R. Co. v. United States*, 92 U. S. 741; *Wright v. Roseberry*, 121 U. S. 500; *Railroad Co. v. Orton*, and cases cited, 6 Sawy. 198.) Mr. Justice FIELD went over the subject fully in *Denny v. Dodson*, 13 Sawy. 68, in which he held that not merely the equitable title, but the legal title to the land passed by the legislative grant *in præ-senti*, in such sense that an action of ejectment could be maintained upon it—that the patent provided for, was not necessary to pass the title, but was only a convenient instrument of evidence—citing a passage from the opinion of the supreme court, in *Langdeau v. Hanes*, 21 Wall. 521, as follows: “In the legislation of Congress a patent has a double operation. It is a conveyance by the government, when the government has any interest to convey, but, where it is issued upon the confirmation of a claim of a previously existing title, it is documentary evidence, having the dignity of a record, of the existence of that title, or of such equities respecting the claim, as justify its recognition and confirmation. The instrument is not the less efficacious as evidence of previously existing rights because it also embodies words of release or transfer from the government.” (*Denny v. Dodson*, 13 Sawy. 76.)

The provision of section 21 of the act of 1864, requiring the railroad company to pay the expenses of surveys and conveyance, does not affect the question of the vesting of the title under the legislative grant. It only applies to the issue of a convenient instrument of evidence. But in this case the title

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had already vested and passed beyond the authority of Congress, before the passage of the act of 1864, which could only amend the prior act so far as to affect its future operation as a law.

A title, therefore, vested by the grant, and performance of the conditions, upon which an action of ejectment can be maintained.

The next question is, did the land in question pass, by the grant of 1862, perfected in 1866-67, in which a gold mine was discovered in 1883, twenty-one years after the grant attached, by the filing of a plat of the general route of the railroad, and the withdrawal of the lands in pursuance of the statute, by the secretary of the interior, and more than seventeen years after the completion of the road, and its acceptance by the President, and more than sixteen years after the final survey, and report of the lands, as agricultural, and not mineral? The parties to this grant, both the United States and the grantee, must be presumed to have contemplated a grant in view of the condition of the lands as they were known, or appeared to be, at the time the grant took effect. In the exception of "mineral lands" from the grant, Congress must have meant not only lands mineral, in fact, but lands known to be mineral, or, at most, such as were, apparently, mineral, and, generally, recognized as such. Congress could not have contemplated that the discovery of a paying mine, fifteen or twenty years after the making of the grant, and the performance of all the conditions by the grantee, required to perfect the title, and render it irrevocable, should vitiate the grant. If so, then such a discovery fifty, or one hundred years after, would effect the same result. In granting the public lands, Congress must be presumed to deal with them in view of the conditions as they are known, or supposed to be, at the time. Exceptions must be presumed to refer to matters that are readily apparent upon inspection. Any others would be altogether too indefinite to be valid. The conditions constituting the exception ought, certainly, to be ascertainable at the time the grant takes effect, or they ought not to be operative; otherwise the greatest confusion and inconvenience, public and private, must, necessarily, result.

The grant should point out what is granted in such certain terms, that the grantee may be able to ascertain by inspection, and know at the time the location is definitely fixed, and it becomes operative, what specific tracts of land are granted, and what are excepted from the grant. These lands soon after the grant were conveyed, in trust, under authority of the law, as security for the bonds issued, out of the proceeds of which the road was constructed; and the proceeds of these sales are devoted by the trustees to the redemption of the bonds. Is this security to be impaired, or destroyed, by taking from the operation of the grant all lands in which at any future time gold or other valuable metals may be discovered? If so, all of the lands may sooner or later revert to the United States, and these bond-holders, and those who, in good faith, have purchased the lands of the company without being aware of the mines secluded in their lower depths, will be largely injured.

These words "mineral lands," used in the act, must be construed in a practical sense—as practical men would use them in contracting about them—must be construed with reference to their present known, or at least, obviously apparent condition.

I had occasion to express my views in a general way upon this subject in *Corell v. Lammers*, 10 Sawy. 246. In that case it is said: "By the words 'mineral lands' must be understood lands known to be such, or which there is a satisfactory reason to believe are such, at the time of the grant, or patent." In that case, it was not necessary to go behind the date of the patent, which was issued to the company *in accordance with, and in pursuance of the grant, and not to a trespasser in opposition to the grant, as in this instance*. Those who make or take subsequent grants must see that there is something to grant. It is not enough to know that the lands contain minerals, at the *date of the issue of the patent*, in order to grant them as mineral lands. It must be known, also, that there has been no prior divestment of title. I am satisfied that the lands ought not, only, to be mineral, in fact, but also to be known as mineral, or there should be satisfactory reason to believe them to be such, at the date when the grant takes effect, in order to fall within the exception of mineral lands, in such sense, as to

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defeat the grant. And this is, evidently, the view of the supreme court, as there is no case, so far as I am aware, wherein that court has sustained an exception of "mineral lands" in these grants, unless they were known to be mineral at the time of the grant. This point is very fully considered by the court in *Colorado Coal Co. v. United States*, 123 U. S. 326, 327. Says the court in that case, quoting from a prior decision: "We say 'land known at the time to be valuable for its minerals,' as there are vast tracts of public land in which minerals of different kinds are found, but not in such quantity as to justify expenditures in the effort to extract them. It is not to such lands, that the term 'mineral,' in the sense of the statute, is applicable. We, also, say lands known at the time of their sale to be thus valuable, in order to avoid any possible conclusion against the validity of titles which may be issued for other kinds of land, in which years afterwards rich deposits of mineral may be discovered. It is quite possible that lands settled upon, as suitable, only, for agricultural purposes, entered by the settler, and patented by the government, under the pre-emption laws, may be found years after the patent has been issued to contain valuable minerals. Indeed, this has often happened. We, therefore, use the term 'known to be valuable at the time of sale' to prevent any doubt being cast upon titles to lands afterwards found to be different in their mineral character from what was supposed when the entry of them was made and the patent issued."

This was but affirming similar views before expressed in *Deffeback v. Hawke*, 115 U. S. 404. In this case, the supreme court also affirm the view of the circuit court expressed in *Cowell v. Lammers*, *supra*, that an exception inserted in a patent, in express terms, by the secretary of the interior, not required or authorized by the statutes, is void.

Now in this case, according to the allegations of the complaint, after the grant had been made, and all the conditions fully performed by the grantee, the road accepted by the President, and the title irrevocably vested in the grantee, and before there was any authority at all to survey mineral lands, as in the case of *Cowell v. Lammers*, *supra*, the township and section including the lands in question were surveyed, as agricultural lands, and

so returned and represented to the land office; and they were so regarded until the discovery of gold-bearing quartz, many years afterward, in 1883, when a patent was refused the railroad company, and issued to defendant's grantor. This discovery, in our judgment, was too late. There was at the date of the legislative grant, and for many years afterwards, nothing appearing in the nature of a valid exception to take the premises in controversy out of the operation of the grant. The department, in issuing the patent to defendant's grantor, instead of to the railroad company, seems to have acted in view of the condition of things, as they appeared, after the discovery of the gold-bearing quartz, in 1883, and not as they appeared, and were known, at the time of the making of the congressional grant; the performance of the conditions of the grant by the grantee; and the subsequent survey made by the government in 1866-67, as agricultural lands.

It is further objected, that the patent thus issued to defendant's grantor cannot be, collaterally, attacked, in an action of ejectment—that it can only be impeached by a direct proceeding in equity to declare it void, or control whatever title passed by it for the benefit of the party equitably entitled. This, it appears to us, would have been the better course, and at first we were disposed to think it was the only course. But upon further consideration, and an examination of the authorities, we think the case does not fall within that rule. In recognizing the rule insisted upon in a proper case, the supreme court, in *St. Louis Smelting Co. v. Kemp*, 104 U. S. 641, add: "Of course, when we speak of the conclusive presumptions attending a patent for lands, we assume that it was issued in a case where the department had jurisdiction to act and execute it; that is to say, in a case where the lands belonged to the United States, and provision had been made by law for their sale. If they never were public property, or *had previously been disposed of*, or if Congress had made no provision for their sale, or had reserved them, *the department would have no jurisdiction to transfer them*, and its attempted conveyance of them would be inoperative and void, no matter with what seeming regularity the forms of law may have been observed. The action of the department would

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in that event be like that of any other special tribunal not having jurisdiction of a case which it has assumed to decide. Matters of this kind, disclosing a want of jurisdiction, may be considered by a court of law. In such cases the objection to the patent reaches beyond the action of the special tribunal, *and goes to the existence of a subject upon which it was competent to act.*"

And in *Wright v. Roseberry*, 121 U. S. 519, the supreme court quote, and approve the foregoing, and further quote and approve another passage, as follows: "A patent may be collaterally impeached in any action, and its operation as a conveyance defeated, by showing that the department had no jurisdiction to dispose of the lands; that is, that the law did not provide for selling them, or that they had been reserved from sale, *or dedicated to special purposes, or had been previously transferred to others.* In establishing any of these particulars, the judgment of the department upon matters properly before it is not assailed, nor is the regularity of its proceedings called into question; but its authority to act at all is denied, and shown never to have existed."

They cite other authorities to sustain this view. Now those observations cover the case. The point was, also, directly decided in *Doolan v. Carr*, 125 U. S. 618. These lands under the allegations of the complaint, "had previously been disposed of" by legislative grant, and the United States had no interest left to grant. There was no jurisdiction left to dispose of them to somebody else, as there was nothing to dispose of. And the court says: "A patent may be collaterally impeached in *any action*, and its operation as a conveyance defeated, by showing *that the department had no jurisdiction to dispose of the lands, . . . or they had been previously transferred to others.*"

That is this case. Had the department issued a prior patent to the railroad company, and then one to the defendant's grantor, there can be no doubt that it would be the duty of the court in this case to determine which carried the title. If the first patent was valid, there would be nothing upon which the second could operate. So in this case, if the congressional grant was valid, and operative, there was nothing upon which the patent to the

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defendant's grantor could operate, and it is competent for the court in this case to ascertain which grant took the land.

Upon the views expressed, the demurrer must be overruled, and it is so ordered, upon the usual terms.

SABIN, J. (*concurring*). I fully concur in the decision just read, but I desire to add a word in confirmation of it, or rather in regard to a matter connected therewith, that has often arisen before the court, and which is very liable to arise in the future. In the judgment just rendered it is decided that the grant by Congress, under discussion, was a grant *in presenti*, and that upon compliance with the terms of the grant the title to the land vested in the railroad company. This matter has been so often before the court, and so often decided by this court, and the supreme court, that it is not worth while to mention it further. There seems in this matter, where the government has issued title to land, either to railroad companies or to the state, by way of its school lands, or to private parties, to be a misunderstanding on the part of many people that all these lands are still subject to exploration by outside parties for mines, or anything else, the same as though they were public lands of the United States. The act of Congress which opens the public land to exploration for mines speaks only of public lands. Indeed, it is public land only that Congress has authority to grant a license to go upon. I think, after the government has, as in this case, divested itself of the title to the land, that any man going upon the land to explore for mines, or anything else, is a mere trespasser. The lands are to that extent withdrawn from exploration for mines; and I am utterly at loss to see how any one can assume that he can acquire a legal title to a mine upon my land, or on any one's land, the title of which has been divested from the government, or how he can assume to acquire any such title from any act of Congress that I have any knowledge of. As I observed, these matters have incidentally come so often before the court for discussion that I think it worth while to call the attention of the profession to the fact that by the express terms of Congress only public land is open for exploration for mineral. As said by the supreme court in the case of

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Belk v. Meagher, 104 U. S. 279, location confers no right of entry upon lands, unless the previous right to enter on that land to locate a mine, or for other purposes, pre-existed. Right of entry is the paramount thing. If a man has a right to enter upon the public land, or a right to enter upon my land, to explore for mines, then he may make a location; but if he has not that right of entry in the first instance, then his location amounts to nothing, whatever he may discover. I know of no law that gives any one a right to explore my land, or any companies' or corporations' land, for the purpose of making a location upon it. The supreme court has often held that no right of pre-emption or otherwise can be initiated by trespass.

SIEGFRIED ET AL. v. PHELPS, COLLECTOR.

CIRCUIT COURT, NORTHERN DISTRICT OF CALIFORNIA.

DECEMBER 16, 1889.

1. CUSTOMS DUTIES—FREE GOODS—REQUIREMENT OF INVOICE. — *Free goods*, not chargeable with duties, are not within the provisions of sections 2854 to 2857, requiring an invoice with a certain prescribed declaration of the shipper, and a certificate of the consul at the port of shipment, or the prescribed bond to be presented to the collector as a condition of entry of the goods.
2. *IDEM*—AUTHORITY OF SECRETARY OF TREASURY. — *The secretary of the treasury* is not authorized to impose, by regulations, burdens on commerce, not imposed or authorized by the statute.

Before SAWYER, Circuit Judge.

At law. On demurrer to complaint, on the ground that the facts stated do not constitute a cause of action.

Mr. John S. Mosby, and *Mr. A. P. Van Duzer*, for plaintiffs.

Mr. J. T. Carey, United States Attorney, for defendant.

SAWYER, Circuit Judge. This is a suit to recover the value of a certain shipment of tea at a port in China to the port of San Francisco, arising out of a refusal of the collector to allow the tea to be delivered to the consignees, without their presenting to him a consular invoice, having indorsed thereon the

declaration required to be made before the consul at the port of shipment, and the consul's certificate required by sections 2854 and following of the Revised Statutes, or giving the bond to produce one at some future day, in pursuance of the provisions of section 2857.

The plaintiffs insist, that the merchandise being tea, which pays no duty, does not fall within the provisions of the statute, which is intended to apply to dutiable goods only; and it appears to me that this position is correct. There is nothing at all said about non-dutiable goods; and the provisions are adapted only to dutiable goods, subject to either *ad valorem* or *specific* duties. The declaration provided for must state that the invoice "contains, if the merchandise mentioned therein *is subject to ad valorem duty*, and was obtained by purchase, a true and full statement of the time when and place where the same was purchased, and the *actual cost thereof, and of all charges thereon*; . . . and when obtained in any other manner than by purchase, *the actual market value thereof at the time and place when and where the same was procured or manufactured*; and if *subject to specific duty, the actual quantity thereof*." This requirement was manifestly intended to enable the collector to determine the amount of duties to be collected, and a form of declaration is prescribed by the statute, adapted to each mode of assessing duties, so that the collector can ascertain the value of the goods subject to *ad valorem*, and the quantity of those subject to *specific* duties. But neither form is adapted to non-dutiable goods, and there is no occasion to know, for the purposes of the revenue, either the value or quantity. Non-dutiable goods are not mentioned, and no declaration is provided adapted to that class of goods. Which of the forms should be adopted, when neither is prescribed and neither would fit the subject-matter? So the bond provided for in section 2857 is to be "*double the amount of duty apparently due, conditioned for the payment of the duty which shall be found to be actually due thereon*." As the goods show for themselves what they are and that they pay no duty, whatever the conditions of the bond, they no more fit the case than do the matters prescribed in the statement to be made before the consul in the case of dutiable goods. Evidently

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the statute mentioned all the cases to which this declaration, certificate, and bond were intended to be made applicable.

To extend the requirements by loose construction or inference to goods that pay no duty would be to impose, in the aggregate, large burdens upon commerce, without any corresponding benefit.

I do not think the secretary of the treasury is authorized by the statute to put any burdens upon commerce in addition to those imposed by the statute itself. He is authorized to make regulations “not inconsistent with law” —to regulate the imposition and enforcement of the burdens, provided for by law, but not to impose others. Burdens imposed upon commerce, in addition to those imposed by statute, would be “inconsistent with law” and unauthorized. (See *Balfour v. Sullivan*, 8 Sawy. 649, and cases cited; *Merritt v. Welsh*, 104 U. S. 695, 700; *Morrill v. Jones*, 106 U. S. 466.)

The court of claims, in *Mosby v. United States*, took this view, when it held that the consul was entitled to recover a considerable amount paid into the treasury, under protest, for fees collected for such certificates appended to invoices and statements of free goods, on the ground that these services performed, although in form official, were not official in fact or in law, and the United States had no concern with them; that it was a matter entirely between the owner of the goods, who voluntarily without requirement of law obtained and paid for the services, and the consul, who in his own individual private character voluntarily performed the service for the compensation received of the owner, so paid of his own free will. The amount of the items in that single instance—two thousand and ninety-five dollars—will afford some indication of the extent of the burden, in the aggregate, such a regulation by the secretary would impose on commerce.

In my judgment the collector unlawfully refused to deliver the tea, and is liable.

The demurrer to the complaint must be overruled, and it is so ordered.

Points decided.

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TEALL ET AL. v. SLAVEN ET AL.

CIRCUIT COURT, NORTHERN DISTRICT OF CALIFORNIA.

DECEMBER 30, 1889.

1. **EQUITY—JURISDICTION—FRAUD—CANCELLATION OF INSTRUMENTS.**—There may often be a remedy, at law, for fraud, but where it is desirable to remove a cloud from the title to real estate by decreeing a cancellation of a fraudulent conveyance, that remedy, being more complete, courts of equity will take jurisdiction, and grant appropriate relief.
2. **IDEM—LIMITATION OF ACTIONS—DISCOVERY OF FRAUD.**—In providing for limitations of actions founded on fraud, the legislature has adopted the principle established by courts of equity, that the cause of action shall not be deemed to have accrued until the “discovery of the facts constituting the fraud;” and to ascertain what conditions constitute a discovery, within the meaning of such statutes, the principles established in equity jurisprudence, whence the idea was derived, must be applied.
3. **IDEM—NOTICE.**—The established principles as to the discovery of fraud are, that the party must be diligent in making inquiry; that means of knowledge are equivalent to knowledge; that a clue to the facts, which if diligently followed would lead to a discovery, is, in law, equivalent to a discovery.
4. **IDEM—RECORD OF FRAUDULENT DEED.**—Where a deed alleged to be fraudulent, bearing evidence of fraud upon its face, has been duly recorded upwards of thirty years, it affords just as strong evidence of fraud to the parties defrauded, as it does to subsequent purchasers. As to the parties defrauded, the question, of what the record imparts knowledge, is not, as in the case of subsequent purchasers, a question of statutory constructive notice, but of diligence.
5. **IDEM—PLEADING.**—Where a bill to annul a conveyance on the ground of fraud is filed, more than thirty years after the performance of the acts of fraud complained of, and, in order to bring the case within the statutory exception, it is alleged that “the acts constituting the fraud” have only been discovered within three years before the filing of the bill, it is, also, necessary to set forth in the bill, *specifically*, what the impediments were to an earlier prosecution of the claim; how the complainant came to be so long ignorant of his alleged rights; the means used by the respondent to keep him in ignorance, and how he first came to a knowledge of his rights.
6. **IDEM—LACHES—NON-RESIDENCE.**—The non-residence and continued absence of the complainant from the state does not excuse a want of diligence in ascertaining his rights.
7. **IDEM—FACTS IN SUIT.**—It is alleged in the bill, that T., a citizen and resident of New York, owning land in California, executed a power of attorney to D., to take exclusive possession and control of the same, and to sell and convey it at his discretion, which power of attorney was duly recorded and remained unrevoked till the death of T., on August 12, 1857; that after the death of T., on September 17, 1857, D., by virtue of said power of attorney, executed in the name of D. a conveyance expressing a consideration of five thousand dollars, to R., of a large amount of said real property situated in the city of San Jose, the said conveyance bearing date August 1, 1857, eleven days prior to the death of T.; that on the same day, for a like consideration expressed, R. conveyed the same property to D., by deed bearing the same date; that said conveyances were made without consideration, and for the fraudulent purpose of enabling D. to appropriate said property of T. to his own purposes; that said conveyances wer

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acknowledged on September 17, and recorded on October 3, 1857; that the numerous respondents are grantees direct, and mesne, from D., and that they purchased with a knowledge of the title of T.; that D. in his lifetime, and respondents, and their grantors, since D.'s death in 1876, concealed these fraudulent acts from complainants, a portion of the heirs of T., who have always lived in the state of New York and never have been in California, and that they did not discover these fraudulent acts until some time in the year 1887, a short time before the commencement of this suit. *Held*, (1) that the suit is barred by the statute of limitations of California; (2) that the cause of suit is stale, and will not be enforced within the established principles of equity jurisprudence; (3) that during the thirty-two years that have elapsed since the death of T., and the fourteen years since the death of D., presumably the only parties who knew their exact relations to each other, and to this land, no sufficient diligence has been exercised by complainants to preserve their right of suit; and (4) that the impediments to a prosecution of the rights of complainants, how they were so long ignorant of them, the means of concealment adopted by respondents, and how complainants first came to a knowledge of their rights, are not sufficiently set out in the bill.

Before SAWYER, Circuit Judge.

In equity. On demurrer to the second amended bill.

This is a bill filed by three parties claiming to be a portion of the heirs at law of Oliver Teall, deceased, and entitled to three fifteenths of the property in question, against many defendants, said to be three hundred and thirty-six in number, to set aside a conveyance from said Oliver Teall, by said attorney in fact, Davis Devine, to A. L. Rhodes, and a conveyance from A. L. Rhodes to said Davis Devine, made in 1857, on the ground of fraud, and to compel a conveyance of their undivided share of property, which consists of a large number of lots, said to be one thousand or more, situate in the city of San Jose. The other heirs, with one exception, who is made a defendant, declined to join, and for that reason are not made parties. The bill alleges that the deceased, Oliver Teall, in 1852, made a power of attorney to Davis Devine, giving him full power to take possession of, and to control and sell all real estate owned by said Teall in San Jose, which power of attorney was duly acknowledged and recorded on March 16, 1852, and that it continued in force and unrevoked down to the time of the decease of said Teall; that said Teall died August 12, 1857; that on August 1, 1857, and down to his death, Teall owned the property in question; that at a date unknown, but

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by a deed bearing date August 1, 1857, said Davis Devine, as the attorney in fact of said Teall, purporting to act under the said power of attorney, conveyed said property to one, A. L. Rhodes, and thereupon, on the same day, said Rhodes conveyed the same to said Devine; that the several deeds of conveyance expressed a consideration of five thousand dollars each, but that in fact no consideration was paid by either; that the conveyance by Devine was not authorized by Teall, but was made for the fraudulent purpose of obtaining the property for himself; that the conveyances, although bearing date August 1st, were not, in fact, executed until September 17, 1857, on which day they were acknowledged; that they were recorded on October 8, 1857, and are still of record; that the defendants in this case are in possession of their respective portions, either under conveyances direct, or mesne, from said Devine, *made subsequently to the record of said pretended and fraudulent conveyances*, or as heirs or devisees of said Devine; that "said possession was taken by said defendants, and each of them, *with full notice of the title of said Oliver Teall and his heirs to said premises, and of the relation of principal and agent subsisting between him and said Devine, as heretofore averred at the time of the date of said pretended and fraudulent conveyances, and are not purchasers of said premises or any part thereof in good faith and for value.*" This, it will be observed, is somewhat indefinite and evasive, as it merely alleges that at the *date* of those conveyances, the parties knew that Teall owned the property, and the relation of the parties; but it does not aver squarely that they or any of them knew that the conveyances were made without consideration for a fraudulent purpose, unless it can be inferred from the averment of the legal conclusion, merely, that they were "not purchasers in good faith." The bill, also, avers that the land was within the pueblo of San Jose, and was confirmed to the city for the benefit of its grantees; that a patent was issued to the city on June 4, 1884; and that a portion has already been conveyed by the city of San Jose to some of the defendants, and the legal title under the patent to the remainder is still vested in the city. In the second amended bill are the following additional allegations: That complainants are natives

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and citizens of the state of New York; that they have always resided in said state, *and were never in the state of California*; that Devine died in 1876, and during his life, and after the death of Teall, he “*carefully concealed the truth of the facts, as alleged, from complainants, and falsely represented to them, that the said Devine was the owner of the property described,*” and after Devine’s death, his heirs and others claiming under him, “*concealed the truth from the complainants, and persistently, falsely, and fraudulently represented to claimants that all of said property belonged to said Devine in his lifetime;*” and all on record at his death belonged to him; “*that none of complainants knew of said conveyances, to wit, said conveyance from Davis Devine as agent of Oliver Teall to A. L. Rhodes, and said conveyance of A. L. Rhodes to Davis Devine, until the year 1887;*” and “*that the said false and fraudulent representations made by said Devine and by his widow, and by their agents, etc., were believed by the complainants to be true, until the year 1887, when they were informed and became cognizant of the truth, as herein set forth in their bill of complaint.*”

Mr. J. B. Lamar, Mr. J. E. Foulds, and Mr. W. H. Castle,
for complainants.

Messrs. Estee, Wilson & McCutchen, and Mr. S. F. Leib, for
respondents.

SAWYER, Circuit Judge. The foregoing statement contains all the allegations of the bill in any way affecting the points at issue, after having been twice amended; and as the bill is unverified by the oath of any person, it must be presumed to state the case of the complainants as favorably to themselves as the facts will justify. The defendants demur, and rely mainly upon four points: (1) That the complainants have a complete remedy at law; (2) that the cause of suit is stale; (3) that the suit is barred by the statute of limitations of California; and (4) that the facts are insufficient to constitute a cause of suit, and there is no equity in the bill.

As to the first ground it is urged, that if the conveyance from Devine to Rhodes, under his power of attorney from Teall, was

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not executed till after Teall's death, as alleged, then it was utterly void, for want of authority, for the power of attorney was, necessarily, vitiated, or revoked in law, by the death of Teall, and this could be shown in an action at law to recover the lands. Hence there is no necessity for going into equity, as there would be a full, speedy, and complete remedy at law. Fraud can often be made available at law, as well as in equity; but it does not follow that the remedy at law is as complete as in equity. Thus in this case, suppose a recovery should be had at law, by showing that these conveyances are void upon the ground alleged, the conveyances would be still outstanding of record, uncanceled, and the apparent title of record would still be in those holding under them. Though fraudulent, they would constitute a cloud upon the title. Fraud has always been one of the principal heads of equity jurisdiction, and in this case, in order to afford a complete remedy for the fraud alleged, it would be necessary to decree the conveyances to be fraudulent, and cancel them, or compel a conveyance of the apparent title in defendants to the parties entitled. No other remedy would be adequate. This point is therefore overruled.

But the points that the cause of suit is stale, upon the well-established principles of equity jurisprudence, and that the suit is barred by the statute of limitations of California, which is applicable to suits in equity, as well as to actions of law, and will therefore be enforced in the national courts, I think are clearly well taken. The principles that govern are applicable to both points, and I shall briefly consider them together. The complainants insist, that, this is a suit "for relief on the ground of fraud," under section 338, Code of Civil Procedure, which is barred in three years. But the fourth clause adds: "The cause of action in such case, not to be deemed to have accrued until the discovery by the aggrieved party, of the facts constituting the fraud." The complainants urge that they did not discover the facts till 1887, and that they are, therefore, within this saving clause. This provision was imported into the statutes of limitations from the equity practice of restraining the setting up of the statute in actions at law, founded upon fraud, under similar circumstances, until the time had elapsed after

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the discovery of the facts, constituting the fraud. (See *Chemical Nat. Bank v. Kissane*, 13 Sawy. 20; *Norris v. Haggin*, 12 Sawy. 53.) I had occasion to consider this whole subject very fully in the last case cited, in which I said:—

“To ascertain of what acts a discovery of the facts constituting the fraud affording the ground for relief consists, we must go to the principles established in equity law, whence the idea was derived. The settled principles on this point are, that the party defrauded must be diligent in making inquiry; that the means of knowledge are equivalent to knowledge; that a clew to the facts, which, if followed up diligently, would lead to a discovery, is, in law . . . equivalent to knowledge. In stating the policy of statutes of limitations, and in illustrating these principles of construction applicable thereto, Mr. Justice Swayne, speaking for the court, in *Wood v. Carpenter*, 101 U. S. 139, together with much more to the point, said: ‘Statutes of limitation are vital to the welfare of society, and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose, by giving security and stability to human affairs. An important public policy lies at their foundation. They stimulate to activity and punish negligence. While time is, constantly, destroying the evidence of rights, they supply its place by presumption, which renders proof unnecessary. Mere delay, extending to the limit prescribed, is itself, a conclusive bar. The bane and the antidote go together. . . . It will be observed, also, that there is no averment that during the long period over which the transactions referred to, extended, the plaintiff ever made or caused to be made the slightest inquiry in relation to either of them. The judgments confessed were of record, and he knew it. It could not have been difficult to ascertain, if the facts were so, *that they were shams*. The conveyances to Alvin and Keller were also *on record in the proper offices*. If they were in trust for the defendant, as alleged, *proper diligence could not have failed to find a clew in every case that would have led to evidence not to be resisted*. With the strongest motives to action, the plaintiff was supine. If underlying frauds existed, as he alleges, he did nothing to unearth them. It was his duty to make the effort. . . .

The discovery of the cause of action, if such it may be termed, is thus set forth: "And the plaintiff further avers, that he had no knowledge of the facts so concealed by the defendant until the year A. D. 1872, and a few weeks only before the bringing of this suit." There is nothing further upon the subject. . . . "Whatever is notice enough to excite attention, and to put the party on his guard, and call for inquiry, is notice of everything to which such inquiry might have led. When a person has sufficient information to lead him to a fact, he shall be deemed conversant of it." (*Kennedy v. Greene*, 3 Mylne & K. 722.) "The presumption is that, if the party affected by any fraudulent transaction or management, might, with ordinary care and attention, have seasonably detected it, he seasonably had actual knowledge of it." (Angell on Limitations, sec. 187, and note.) A party seeking to avoid the bar of the statute on account of fraud, must aver and show that he used due diligence to detect it, and if he had the means of discovery, in his power, he will be held to have known it. (*Buckner v. Calcote*, 28 Miss. 432, 434. See, also, *Nudd v. Hamblin*, 8 Allen, 130.) . . . Concealment by mere silence is not enough. There must be some trick or contrivance intended to exclude suspicion and prevent inquiry. There must be reasonable diligence, and the means of knowledge are the same, in effect, as knowledge itself. He does not say that he had not full possession of means of detecting the fraudulent arrangement, if it was fraudulent, or that there had been concealment, and the possession of such means of knowledge, is, in equity, the same as knowledge itself.' (*New Albany v. Burke*, 11 Wall. 107.)"

What have the complainants in this case done to unearth this alleged fraud? They do not inform us. They allege that neither of them has ever been in the state of California. They allege generally that all these three hundred and thirty-six defendants, and their indefinite number of grantors, have concealed the alleged fraud, and the only means of concealment alleged, is, that they claimed to own the lands which they had purchased, and that their first grantor, Devine, owned it before them. This bill was filed June 1, 1889, and Teall died August 1, 1857, nearly thirty-two years before the filing of the bill. San Jose

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was then a small town. Now it is a large city. In the nature of things there must have been during that time almost innumerable transfers of portions of this real estate. These lands are alleged to be held by defendants by direct and through *mesne conveyances* from Devine; much of it must naturally have passed through many hands, during the last thirty-two years, and the number of those who now hold, and who have held them during that time, must have run up into the thousands. And all these, under the general allegations of the bill, must have concealed the great fraud by representing to these complainants that Devine once owned the land, and that they owned it by purchase from him. No one of the complainants was ever in California. Did these several defendants and their numerous grantors go to New York to give the complainants this false information, upon which they so confidently relied? All the defendants' grantors, as well as the defendants, must have purchased with notice of the fraud, or their title cannot be shaken. I presume any party who supposes he has found a clear, apparently perfect title of *record* to land, and purchased it on the faith of the record, would be very apt to allege that he owned it, and that his grantor before him owned it, when his right should be challenged by a stranger, who claimed it himself. Can such action alone be concealment of the fraud in such sense as to constitute bad faith and vitiate their titles? Would such a claim alone be any sort of evidence that he was concealing a known fraud? The first thing to do, it would seem, is to show by other satisfactory evidence that there was, in fact, a fraud, and that he purchased with knowledge of that fraud. The pleader would seem to base his loose, general allegation of notice of the fraud alleged, in making the two conveyances of August 1, 1857, by all deriving title under Devine, upon the fact, that they purchased subsequently to these conveyances having been placed upon the record—this fact being so particularly alleged; and that the record upon its face afforded them such notice of the fraud, as would vitiate their purchase for want of good faith. It may be true, that finding upon the record, the two deeds dated a few days before, but acknowledged and recorded a few weeks after the death of

Teall, the first being a conveyance from Teall, by Devine, as his attorney, to Rhodes, and the next by Rhodes to Devine, on the same day, should excite suspicion. But it is not unusual for conveyances to be executed and delivered before acknowledged, and at some subsequent time be either acknowledged, or proved, by the witnesses thereto, and recorded. So that fact is by no means conclusive evidence of fraud. So, also, the law does not encourage dealings between principals and their agents, or trustors and trustees, especially through acts of the agents or trustees, but yet such transactions sometimes do occur, and are not questioned by the principals. But where they have taken place, and have not been called into question by the principals or their representatives for many years, it would seem that strangers ought to be protected from future disturbance by the principals. But however this may be, if the record upon its face afforded purchasers the means of detecting the fraud, it was equally efficacious for the suggestion of fraud to these complainants. If a consultation of the record would bring knowledge home to purchasers, a similar consultation would have brought it home to these complainants. It is urged, however, by complainants, that under the statutes of California, the record of a conveyance is *constructive* notice only to *subsequent* purchasers, and is not such to other parties. Grant it for the purposes of this case; but this is not a question of *constructive notice*; it is a question of diligence—whether these complainants and their ancestors have exercised due diligence in ascertaining their rights and pursuing their remedies? In this, and in all other of the United States, the statutes provide for recording all instruments of conveyance. These laws are presumed to be known by all who are affected by them, and they are, in fact, known to all citizens having the slightest degree of intelligence. A storehouse of information is here provided by law, open to all. These conveyances were, in fact, recorded as required by law, almost thirty-two years ago—nearly a third of a century. The record was open to the examination of the complainants, and if not constructive notice binding upon them, whether they examined it or not, they *knew* that if Teall or Devine had a title to these lands, that the title to them must be on the record,

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and that they could find it readily by looking for it; and when found, it would have given them, in fact, that same information—actual information—that in law, it communicated to the defendants, whether they examined it or not. In order to avoid the inconvenience of the actual notice and relieve themselves from the embarrassment of possessing the same knowledge, in fact, as that imposed by law upon the defendants as purchasers, complainants take pains to aver, that they were non-residents of the state and had never been in it, and did not know that these two conveyances were in existence and on the records of Santa Clara County till 1887. Now if they made inquiries of all these defendants, and these defendants fraudulently told them, as they allege, that Devine owned all the lands that stood in his name on the record, at, and before the time of his death, and they purchased from him, that representation of itself must necessarily have in fact, by implication at least, brought to their notice the existence of these conveyances upon the record. At all events, with the knowledge they must have had that titles are required to be recorded, and that these defendants claimed the land, if they did not consult the record, to see what title Teall and Devine had to these lands, they were guilty of the grossest laches and negligence, and were unaccountably inattentive to their own interests. If they did examine it, in person, or by agents, the record afforded them the same clues to fraud that were furnished to purchasers, and if followed up vigorously, and intelligently, it could not have failed to unearth any fraud that in fact existed. If they failed to do this, it was their own fault. As before stated, “the party defrauded must be diligent in making inquiry. The means of knowledge are equivalent to knowledge. A clue to the facts which if followed up diligently would lead to a discovery is, in law, equivalent to a discovery—equivalent to knowledge,” wholly independent, and outside of statutory constructive notice of the contents of a record. (*Hecht v. Slaney*, 72 Cal. 636, 637; *Manning v. San Jacinto Tin Co.* 7 Sawy. 430—433.)

So, also, the means by which the complainants were so long kept ignorant of these rights by the respondents, and the impediments, etc., to an earlier prosecution of their claims, are not,

sufficiently, set out in the bill. Says the supreme court, in *Godden v. Kimmell*, 99 U. S. 211: "Courts of equity, acting on their own inherent doctrine of discouraging for the peace of society antiquated demands, refuse to interfere in attempts to establish a stale trust, except where the trust is clearly established, or where the facts have been, fraudulently, and, successfully, concealed by the trustees from the knowledge of the *cestui que trust*. Relief in such cases may be sought; but the rule is that the *cestui que trust* should set forth in the bill specifically, what were the impediments to an earlier prosecution of the claim, and how he or she came to be so long ignorant of their alleged rights, and the means used by the respondent to keep him or her in ignorance, and how he or she first came to the knowledge of their rights. (*Budger v. Budger*, 2 Wall. 87; *White v. Parnther*, 1 Knapp, C. C. 227.) 'When a party appeals to the conscience of the chancellor in support of a claim,' says Mr. Justice FIELD, 'where there has been laches in prosecuting it, or long acquiescence in the assertion of adverse right, he should set forth in his bill specifically what were the impediments to an earlier prosecution of the claim; and if he does not, the chancellor may justly refuse to consider his case on his own showing, without inquiring whether there is a demurrer, or any formal plea of the statute of limitations contained in the answer.' (*Marsh v. Whitmore*, 21 Wall. 185.)"

None of these means are set out in this bill.

The same doctrine is repeated in *Richards v. Mackall*, 124 U. S. 187. (See, also, *Sullivan v. Portland etc. R. R. Co.* 94 U. S. 806-811; *Brown v. County of Buena Vista*, 95 U. S. 160; *Hume v. Beale's Ex'r*, 17 Wall. 336; *Hayward v. Eliot Nat. Bank*, 96 U. S. 611; *Spicdel v. Henrice*, 120 U. S. 377-387.) The fact that the complainants lived in "the remote and secluded" regions of the state of New York, far from means of information, and were never in California, cannot excuse them from the use of proper diligence. Says Mr. Justice Bradley, in *Broderick's Will Case*, 21 Wall. 519: "Parties cannot thus, by their seclusion from the means of information, claim exemption from the laws that control human affairs, and set up a right to open up all the transactions of the past. The world must move on, and those who claim an interest in persons or

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things must be charged with knowledge of their *status* and condition, and of the vicissitudes to which they are subject.”

Upon this passage I took occasion to observe in the *San Jacinto Tin Case*, 7 Sawy. 433: “It must not be forgotten, not only that the world ‘moves on,’ but that in this age and country, and in this part of the country, it moves rapidly. Three years now, and especially in California, is longer in events and progress, than twenty years some centuries ago, when the statutes of limitation were adopted in England. Parties cannot lie down to sleep upon their rights, and on waking up many years afterward, find them in the same condition in which they were left.”

In this case, Teall, under whom complainants claim, died nearly thirty-two years ago, and Devine, the other party under whom respondents claim, died in 1876, nearly fourteen years ago. So the only two parties who are presumed to know what their relation to these lands, and to each other, in fact, was, have long since died. Under such circumstances several hundred citizens, who have for more than thirty years enjoyed and improved their property by their labor and expenditure of money, in a large city, should not now be deprived of it by parties who have so long slumbered on their rights, if they had any, and been so “grossly neglectful of their own interests.”

The fact that a patent was issued to San Jose upon confirmation of her pueblo lands, cannot affect the question. No new title has vested in the complainants thereunder unless they can derive it through the parties holding under the conveyances in question, alleged to be fraudulent. The city holds the title in trust for those who succeed in maintaining their rights under the Teall and Devine conveyances. If Teall’s rights through the Devine and subsequent conveyances and the statute of limitations have been cut off, there is no channel through which they have since returned to these complainants. The parties who have a vested title either under the two conveyances in question, or under the statute of limitations, or both, are the *cestui que trust* of the city of San Jose.

I am satisfied that the facts stated in the bill are insufficient to take the case out of the first clause of the fourth paragraph

Points decided.

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of section 338 of the statute of limitations of the state of California, and that the suit is barred by the statute. I am also satisfied that the cause of suit is stale, under the principles relating to the subject long established and enforced by courts of equity. So, also, the bill is insufficient because it fails to set out specifically what were the impediments to an earlier prosecution of the claim; how they came to be so long ignorant of their alleged rights, and the means used by the respondents to keep them in ignorance; and how they first came to a knowledge of their rights.

I am satisfied, also, that the bill cannot be truthfully so amended, as to present a case for equitable relief. The parties have already amended twice. Some of the allegations now so, generally, made, must, necessarily, be largely overstated. How is it possible that all the present respondents, and their numerous grantors intermediate between them and Devine, should have taken active means to conceal, and to successfully conceal from these complainants their rights, however credulous and confiding they may have been? Besides, upon these sweeping allegations, embracing, *in solido*, three hundred and thirty-six respondents, how can any individual respondent know upon what case he is to be prosecuted? Upon what point as to him, individually, will the blow fall; and whence will it come? How is each individual respondent to know how to prepare for trial under these loose, sweeping, general allegations? The demurrer must be sustained, and the bill dismissed, and it is so ordered.

TATUM ET AL. v. GREGORY ET AL.

CIRCUIT COURT, NORTHERN DISTRICT OF CALIFORNIA.

JANUARY 20, 1890.

1. PATENTS FOR INVENTIONS—INFRINGEMENT—GANG-EDGERS.—*Held*, on the evidence, that claim 1 of patent No. 227,936 and claim 1 of patent No. 290,358 are infringed by defendants, and that claim 3 of patent No. 258,946 is not infringed.
2. IDEM—STATE OF THE ART—EVIDENCE.—Evidence of the existence of a single isolated machine many years prior to the date of the patent, which is not shown to have gone into use, is not competent or sufficient to show the state of the art.

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3. **IDEM.**—Proof of the state of the art in patent cases must be clear and satisfactory and free from reasonable doubt, especially when it relates to a time many years anterior to the date of the patent, and the witness relies solely on his memory.
4. **IDEM—MECHANICAL EQUIVALENTS.**—In construing patents the doctrine of mechanical equivalents is applicable to claims for combinations of old elements and improvements on primary inventions, as well as to claims for primary inventions.
5. **IDEM—COMBINATIONS.**—A claim for a combination of elements is infringed only by use of all its elements; and where the evidence of infringement is clear only as to the use of one of the elements of the combination by defendant, and is not clear or satisfactory as to the use of the other elements, it will be *held* that infringement is not proven.

Before SAWYER, Circuit Judge.

! In equity.

Suit on three letters patent for improvements in gang-edgers granted to J. A. Robb, and assigned to complainants, numbered respectively 227,936, 258,946, and 290,358, and dated respectively May 25, 1880, June 6, 1882, and December 18, 1883. In order to show the state of the art, a witness for respondents produced a sketch, marked "Exhibit 19," which he stated represented a machine seen by him at Bangor, Me., over fifteen years before, in the shop of a manufacturer. Said sketch was made solely from memory. Only one machine was claimed to have been built like the sketch, and witness was not positive that it was ever in actual use; after building the one machine like the sketch, the builders changed the form of all future machines, and built them on a different plan, under the patent of one Richardson, a copy of which is in evidence, and shows a machine entirely different from the sketch.

Messrs. Langhorne & Miller, for complainants.

Mr. John L. Boone, for respondents.

SAWYER, Circuit Judge (*orally*). I have examined this case with great care. I am satisfied that claim 1 of patent No. 227,936 is infringed. I do not think there is any limitation, required by the state of the art as shown, to so limit the construction of the claim as to deprive the patentee of the benefit of his invention in that case. Claim No. 3 in patent 258,946,

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I do not think the proof shows to have been infringed. Defendants' device doubtless has one of the elements of the claim in it, but it is not satisfactorily shown that all the elements in that combination are used. I do not think the claim in that patent is shown to have been infringed in this case. In the case of patent No. 290,358 I had some difficulty, but upon a full examination I am satisfied that that claim is infringed, also. There is no limitation of construction required by the state of the art as shown, to cut it off. Exhibit 19, which is most relied upon as affording grounds for limiting the scope of the patent, I do not think is shown in such form as to be in a position to entitle it to be considered as showing the state of the art. Besides, I am not satisfied that that exhibit is a plan of any machine that was before constructed. The proof is entirely unsatisfactory. It was drawn by a party from memory, who claims to have seen fifteen years ago the machine represented by it in one of the eastern states, and certainly, was not drawn after the patent of Richardson, the one under which the machine was constructed, if under any in evidence. I am not satisfied that the machine was constructed as the witness has drawn it. It is one of those cases where a man who remembers back a great many years thinks something he saw in New York or Wisconsin, or at some other distant point, is similar. I do not think it can cut any figure in construing the claim of the patent in question. I do not think that Sterns' patent, the other one more particularly relied on, affords any ground for limiting the construction of the patent in such manner as to avoid an infringement.

The case of *McCormick v. Talcott*, 20 How. 405, was relied on very strongly as limiting this construction. The point covered there relates to the use of mechanical equivalents or substitutes. That case once troubled me a good deal. It was cited in the first patent case that I ever tried, when I was not very familiar with the subject. It was pressed on me, very earnestly, as holding that the doctrine of mechanical equivalents or substitutes had no application to improvements in patents, or patents for combinations of old elements, and only related to original inventions and new devices. The point was argued and pressed very earnestly. The loose language used in the

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opinion, perhaps well enough as related to the facts of that case, afforded some ground for such a contention. I myself could not see why the doctrine should not be applicable to combinations and improvements as well as to original patents and new devices. I rejected that theory. I was afterwards fully sustained in the view that I took, in the case of *Gould v. Rees*, 15 Wall. 192; *Seymour v. Osborne*, 11 Wall. 555; and *Gill v. Wells*, 22 Wall. 28, where the court stated in very decided terms that the doctrine of equivalents was as applicable to improvements and combinations of old elements, as to original inventions and new devices.

The contention of defendants in this case, however stated, really involves that doctrine, whether equivalents in the character of substitutes are available in patents for combinations and improvements. They clearly are, and it is so very distinctly stated in those cases. In that view, I do not think there is anything in the prior patents referred to which should cut out the claim, or limit it so as to exclude this improvement or avoid an infringement. I am of the opinion that that claim is also infringed. The result is that claim No. 1, in patent 227,936, is infringed, and claim No. 1, in patent 290,538, is infringed. In regard to the other I find in favor of the defendant, that is to say, no infringement is satisfactorily proved. Defendants may infringe hereafter, but as to this case an infringement is not satisfactorily proven.

Mr. Miller. That was the second patent set up containing the T slot.

The Court. Yes, the defendant's machine evidently has the T slot, but it does not appear that it has the other elements of the combination. The testimony is very brief and very loose. It undoubtedly had a T slot, but there are two or three other elements that it does not satisfactorily appear that the defendant's machine had.

WILLIAM LAMBERT v. A. C. FREESE.

DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA.

JANUARY 22, 1890.

1. COLLISION.— Libel dismissed for want of satisfactory proof. The sinking of the dredger was caused by collision with the barge in tow of respondent's tug.

Before HOFFMAN, District Judge.

Mr. E. P. Cole, for libellant.*Mr. Milton Andros*, for respondent.

HOFFMAN, J. The libel in this case is filed to recover the value of a dredger alleged to have sunk at the Devil's Elbow, in the San Joaquin River, in consequence of being struck by a barge in tow of a tug-boat owned by the respondent.

The testimony is very voluminous. It is unnecessary to examine it in detail. That the dredger was struck by the barge is, I think, clear. But whether through the fault of either the latter or of the tug may admit of doubt.

The dredger was moored in a sharp bend of the stream within, as one of the libellant's witnesses states, forty to fifty feet of the edge of the channel. It appears that in making a sharp turn at the Devil's Elbow tugs descending the river with barges in tow find great difficulty in preventing the latter from sheering towards the left bank. Collisions from this cause are of very frequent occurrence, but usually attended by no serious consequences.

The tug was going on "the slow bell," which would give her a velocity through the water not much more than was necessary for her to retain steerage-way. The tow-line was of the usual and proper length. There seems to have been no want of diligence on the part of the persons in charge of either vessel.

The dredger was moored in the part of the bend which, perhaps, unnecessarily increased the difficulties and dangers of the navigation by tugs and tows coming down the river. Had her position been a little lower down or, possibly, a little higher up, it seems to me that those difficulties and the chances of col-

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lision would have been appreciably diminished. But I do not insist on this point; for I have found it impossible to reconcile the libellant's contention that the dredger sunk in consequence of the collision, with the fact that the barge sustained no injury whatever. The dredger appears to have been constructed of very heavy material. Its hull was formed of timber or logs laid one above another in a tier, five logs in height. These timbers were twelve inches square, and were firmly fastened together by lag screws. There was, on each side, a spud case, also constructed of heavy timbers, while the strength of the structure was further increased by iron bands or straps, the position of which it is unnecessary to describe.

The barge was built of four-inch planks, with the usual fender or guard running along the gunwale.

It appears to me, that it was impossible for the barge to have struck the dredger with a force sufficient to cause the latter to sink, without herself sustaining damages which would have borne witness to the violence of the collision. That this was the view of the parties in interest, immediately after the occurrence, may be reasonably inferred from their conduct.

A few days after the accident, the respondent, Mr. Freese, was called upon by a person supposed to be the owner, or agent of the owner, of the dredger. Mr. Freese represented to him that the dredger could not have been sunk by the barge, as the latter had sustained no injury whatever, and that the sinking of the dredger must have been caused by her leaking or by carelessness and neglect of those in charge of her. Whether the owners of the dredger acquiesced in this view does not appear. But it is certain that the present libel was not filed until nearly two years afterwards. As to the condition of the dredger with respect to leaking, the testimony is irreconcilably conflicting.

There is much, however, in the evidence of Mr. Spurgeon, a witness for the libellant, that seems to indicate a singular want of care or an indifference on the part of the two persons in charge of the barge, after the accident occurred; or perhaps their conduct may be explained by the absence of any expectation on their part that any serious consequences would result from the collision.

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HOFFMAN, J. The salvors in these cases saved property to the value of \$100,000, which would otherwise have been nearly, if not quite, a total loss.

Early in the morning of August 26, 1889, a fire broke out in the Port Costa warehouse, which soon spread to the adjoining wharf, to which the wooden ship Hanowaur was made fast. Astern of her was the steel ship Kenilworth, also made fast to the wharf. Both of these vessels caught fire from the burning wharf and warehouse. The master of the Kenilworth endeavored to move his vessel into the stream, but the tide took her alongside and against the Hanowaur. The falling rigging and spars entangled the two vessels, and it was found impossible to separate the Kenilworth from the Hanowaur.

At this time the steamboat San Joaquin, No. 4, was lying with banked fires at Grangers' wharf, about one mile further up the stream.

About four o'clock A. M., her captain was informed of the fires at Port Costa. He immediately repaired to the spot, saw the situation of the vessels, and at once returned to his boat, got up steam, and came down in her to render what assistance he could. Lines were attached to the Kenilworth, and after two or three attempts, rendered abortive by the parting of the lines, he succeeded in hauling out with his own hawser both vessels into the stream, where they were soon after separated by the force of the tide. He then towed the Kenilworth to the mud flats where she was anchored. I consider the San Joaquin performed a very meritorious salvage.

She was built like the ordinary stern-wheelers that ply on our rivers, of very light and combustible materials, saturated and painted with oil. Her deck load consisted of broom-corn loosely packed in bales, and very inflammable. The captain did everything in his power to minimize the dangers he exposed himself to by spreading tarpaulins on his deck load, and by stationing a man with a hose to extinguish any sparks or flakes of fire that might fall upon his vessel. Had fire been communicated to the boat in several places simultaneously, or which, from any cause had obtained a headway beyond the power of his hose to control, her total destruction was inevita-

ble. The loss to her owners would in that case have been at least \$75,000, perhaps more. But it is to be noted that the San Joaquin, No. 4, did not extinguish, or assist in extinguishing the fire; that service was performed by the tugs; but for their intervention the Kenilworth must have been consumed as the Hanowaur was, and the services of the steamer would have been barren of result.

On the other hand, it must be borne in mind that the tugs did not arrive until some hours after the steamer had hauled the vessels into the stream. Had they remained fouled with each other, and in close proximity to the burning warehouse and wharf, the damage to the Kenilworth must have been greatly increased. The forward part of the ship, which was then intact, might have been reached by the conflagration, and this part of the vessel furnished a basis for the operations of the Relief, which performed the most effective part in extinguishing the fire.

On the arrival of the tugs their first service would, in all probability, have been to haul the vessels away from the burning warehouse, and to separate them from one another. But this service had already been performed by the steamer. Valuable time was thus saved, and the tugs were enabled to go to work effectively, and without delay.

All the tugs displayed commendable alacrity in repairing without delay or hesitation, and at their best speed, to the scene of the disaster, some twenty or twenty-five miles distant from this city. The Monarch was the first to arrive. The Relief some fifteen or twenty minutes later; and soon after, the Sea King.

The Monarch at first directed her hose upon the after-part of the ship from her own deck. Some little time elapsed before the decks or deck beams of the ship were sufficiently cooled to permit her hose or that of the Sea King, whose hose was led across the Monarch, to be played down the lazarette hatch and hatch No. 4.

It is claimed on behalf of these tugs that they extinguished the fire in both of those hatches. But of this there seems to be some doubt. The Relief made fast to the forward part of the

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ship, and after extinguishing the fire on deck, attacked the fire in the hold, working from forward, aft. I am of the opinion that the merit of extinguishing the fire substantially belongs to the Relief, although the Monarch and Sea King contributed to the result, to what *precise* degree I am unable to determine.

The Monarch was provided with one hundred feet of hose; the Sea King with two hundred; the Relief had twelve hundred feet. The Monarch's hose was one and one-fourth inches in size; the Sea King had one hundred feet of one and one-fourth hose, and one hundred feet of two-inch hose. The Relief could play five streams of two and one-half inches, and one stream of one and one-fourth inches. The disparity between her means and appliances for the extinguishment of fire was thus very great.

The Relief, it is true, may not have played all her streams; but it is not denied that she played five streams until noon, and after that, four streams. It is reasonable to suppose that she used the extraordinary means at her command with judgment, and as circumstances required. She, perhaps, incurred some little risk of fouling her propeller in the wreckage floating, and partially submerged near the quarter of the ship to which she was made fast. She hired three extra men from the shore to re-inforce her crew. That these men incurred a greater risk than they probably supposed in descending into the hatches to extinguish the fire in the wheat, of which the cargo was composed, is, I think, evident. Several of them, including the mate of the Kenilworth, were brought up from the between decks almost unconscious from suffocation.

Captain Freeman, late United States inspector of hulls for this district, when asked if he had any experience in regard to burning wheat, replied that he had none. A few weeks afterwards, he and a very respectable merchant of this city were instantly and fatally asphyxiated by the fumes of burning wheat in the hold of a vessel, into which they had incautiously descended. Had this deplorable incident occurred before the salvage service, in this case, was rendered, it would justly have been considered to have enhanced the merit of the salvors by the exhibition of gallantry in affronting a known and formidable danger.

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In considering the amount of salvage to be awarded, and its distribution, I am reminded of the observation of the great chief justice in *The Sybil*, 4 Wheat. 98: "It is almost impossible that different minds, contemplating the same subject, should not form different conclusions as to the amount of salvage to be decreed and the mode of distribution." I have examined the numerous cases, to which I have been referred, where salvage has been decreed under circumstances analogous to those of the suits under consideration. It is impossible to extract from them any definite rule or guide. Tested by some of them, the salvage I shall award would be deemed excessive; according to others, it would be considered inadequate. The only analogous case, which can be taken as authoritative, is that of *The Connemara*, 108 U. S. 352. The district court had awarded as salvage \$18,930 on an agreed value of \$236,637. This award the supreme court refused to disturb, on the ground that it was not so manifestly excessive as to justify its interference under the act of Congress of February 16, 1875. The court observes, however, that it might have been better satisfied if the award had been less.

In applying this decision to the cases at bar, the circumstances must be considered. A ship towed by a steam tug down the Mississippi River was anchored, and the tug was lashed to her side. During the night a fire broke out on board the ship. It was discovered by a passenger. He gave the alarm to the tug, and the fire was, by the aid of a steam pump and hose, extinguished by the crew and passengers of the tug in twenty minutes. It will be noted that, in this case, the tug was in the service and employ of the ship. Her salvage service was, in a certain sense, compulsory and necessary to her own safety, unless, with means of extinguishing the fire in twenty minutes, she had cast off the lashings and left the ship to her fate. She does not appear to have had any extraordinary means or appliances, specially adapted for the extinguishment of fires. The amount of property endangered was much larger than the amount saved in the case at bar; but the decree of peril was far less, as is conclusively shown by the fact that the fire was extinguished by the use of a steam pump and hose in twenty minutes.

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Points decided.

In the case of the *Suliot*, 5 Fed. Rep. 104, Mr. Justice Bradley observes: "In making this award to the Protector, we have had regard to the fact that the value of her aid in affording salvage service is greatly enhanced by her being fitted and furnished for performing this kind of work. Being always ready and at hand, and promptly efficient for the accomplishment of her purpose, a fire happening to any vessel in the harbor is bereft of much of its terror, and the damage ensuing therefrom is in most cases, and probably was, greatly lessened in extent."

The observations of Judge Speer in the case of *The Gler and Cargo*, 31 Fed. Rep. 426, are to the same effect: "These tugs, rigged in this way for the purpose of extinguishing fire, are just as important for the shipping interests as the fire-engines are to the city. They contribute in saving losses to the people and to insurance companies as do the fire-engines, and it is a part of the policy of the law to encourage those in charge of them."

I shall award a total salvage of \$14,500, to be distributed, \$4,500 to the *San Joaquin*, No. 4, \$3,000 to the *Monarch* and *Sea King*, and \$7,000 to the *Relief*.

UNITED STATES v. DALLES MILITARY ROAD CO. ET AL.

CIRCUIT COURT, DISTRICT OF OREGON.

FEBRUARY 20, 1890.

1. LAND GRANTS—MILITARY ROADS—COMPLETION—BONA FIDE PURCHASERS—ESTOPPEL.—In 1867 there was granted the state of Oregon, by an act of Congress, certain public lands to aid in the construction of a military wagon road. The grant was in the words, "there be and hereby is granted to the state of Oregon," and it was provided that the lands granted should be disposed of by the legislature for the purposes of the grant. It was further provided that when the governor of the state should certify to the secretary of the interior that ten continuous miles of the aided road are completed, a quantity of the lands granted, not exceeding thirty sections, might be sold, and so on from time to time until the road should be completed. The governor of Oregon having thereafter certified to the completion of said road, the commissioner of the general land office withdrew from sale the lands granted, in favor of the defendant company, to which the grant had been transferred by act of the state legislature, and afterwards, in 1874, Congress by an act provided "that in all the cases when the roads in aid of the construction of which said lands were granted, are shown by the certificate of the governor of the state of Oregon, as in said

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acts provided, to have been constructed and completed, patents for said lands shall issue in due form to the state of Oregon as fast as the same shall, under said grants, be selected and certified, unless the state of Oregon shall, by public acts, have transferred its interests in said lands to any corporation or corporations, in which case patents shall issue from the general land office to such corporation or corporations upon payment of the necessary expenses thereof." *Held*, (1) The act granting lands in aid of the Dalles military road passed a present title to the state of Oregon, to be defeated only by a breach of conditions subsequent. (2) The fact that the governor's certificate was not made on completion of each section of ten miles of the road, makes no difference. It is sufficient if made at one time, covering the completion of the whole road. (3) The authority to determine whether the road was completed was vested solely in the governor of Oregon, whose decision, in the absence of any such fraud as would vitiate it, is necessarily final and conclusive. (4) The right to a patent once vested is equivalent, as respects the government dealing with the public lands, to a patent issued. (5) Purchasers of these lands from the state's grantee were not required to go over the road and ascertain for themselves whether it had been completed in all particulars in accordance with the requirements of the granting act, but were entitled to rely upon the record, constituted by the said acts of Congress and of the state, the withdrawal of the lands by the commissioner, and the governor's certificate. (6) The provision of the act of Congress authorizing the bringing of this suit by the United States to procure a decree of forfeiture of said lands, "saving and preserving the rights of *bona fide* purchasers of either of said grants, or of any portion of said grants, for a valuable consideration," recognizes the rights of innocent purchasers, if they had been otherwise doubtful. (7) Where fifteen years have elapsed after affirmative and confirmatory action by Congress in directing the issue of patents to lands in all cases where the certificate of the governor had been made, and twenty years have elapsed after the date of such certificates, and before the act authorizing the bringing of this suit, it is not within the established principles of equity jurisprudence to allow such suit to be maintained, and the cause of suit ought to be regarded as stale. (8) The government is now estopped by the action had from time to time by Congress and its agents duly authorized, and the public record made of such acts, from alleging the non-fulfillment of the statutory conditions of the grant.

Before SAWYER, Circuit Judge.

This is a bill in equity, filed by the attorney-general of the United States, in pursuance of the act of Congress of March 2, 1889 (25 Stats. 850), to procure a decree of forfeiture of all lands granted by the act of Congress of February 25, 1867, to the state of Oregon, to aid in the construction of a military wagon road from Dalles City, on the Columbia, to Fort Boise, on the Snake River, found in 14 Stats. 409, on the ground that the terms of the grant had not been complied with. It also seeks a cancellation of all patents therefor, issued by the United States under the act, and all conveyances to purchasers under said patents, and under the act, as well as a forfeiture of the

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lands still unpatented. The bill alleges, in substance, that the road, in aid of which the grant was made, was never constructed, in whole, or in part; that through the fraudulent representations of the officers, stockholders, and agents of the corporation, the governor of Oregon was deceived and induced to issue a certificate in pursuance of the provisions of the act, declaring that he had examined the road throughout its entire length, and that it had been constructed and completed in all respects in accordance with the statute; and that, relying upon this certificate, the patents to portions of the lands had been issued by the United States. The state of Oregon, by an act passed October 20, 1868, granted the same lands to the defendant, the Dalles Military Road Company, for the same purpose and upon the same terms as prescribed in said act of Congress. (Stats. Or. 1868, 3.) After the road was claimed to have been completed in accordance with the provisions of said several acts, and after the governor of Oregon had certified to the completion, as provided in the acts, and the road had been accepted, and patents to portions of the lands issued, the said Dalles Military Road Company conveyed the lands for a large consideration to one Edward Martin, and by sundry mesue conveyances from him, the title became vested in the defendant, the Eastern Oregon Land Company. The defendants, by leave of the court first obtained, filed two pleas to the bill, supported by an answer under oath, denying the fraud alleged in the unverified bill as prescribed by equity rule 32. The first alleges:—

“That George L. Woods, then the governor of Oregon, without any false or fraudulent representations having at any time been made to him by the officers, stockholders, or agents of the Dalles Military Road Company, or any other person or persons in its or their interest, and without any one or more of them having falsely or fraudulently induced him to certify that the road of said company was constructed in accordance with law, and without any fraud whatever on his part, on January 23, 1869, made a certificate, which certificate is in the words following: ‘I, George L. Woods, governor of the state of Oregon, do hereby certify that this plat or map of the Dalles Military Road has been duly filed in my office by the Dalles

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Military Road Company, and shows in connection with the public surveys, as far as said public surveys are completed, the location of the line of route as actually surveyed, and upon which their road is constructed in accordance with the requirements of an act of Congress approved February 25, 1867, entitled "An act granting lands to the state of Oregon, to aid in the construction of a military wagon road from Dalles City, on the Columbia River, to Fort Boise, on Snake River," and with the act of the legislative assembly of the state of Oregon, approved October 20, 1868, entitled "An act donating certain lands to Dalles Military Road Company." I further certify that I have made a careful examination of said road since its completion, and that the same is built in all respects as required by said above-recited acts, and that said road is accepted.' That afterwards, on May 31, 1876, the Dalles Military Road Company, for a valuable consideration, to wit, the sum of one hundred and twenty-five thousand dollars, to it paid by Edward Martin, sold and conveyed all the said lands belonging to it to said Martin, his heirs and assigns, and that by sundry mesne conveyances from said Martin to the Eastern Oregon Land Company, one of the defendants, the title to all said lands became and now is vested in said defendant, the Eastern Oregon Land Company."

The second plea sets out the same facts, as stated in the first, and the further facts that on December 18, 1869, after making of said certificate by the governor of Oregon, the commissioner of the general land office withdrew from sale the odd-numbered sections within three miles on each side of the said road in favor of the Dalles Military Road Company; that Congress afterwards, on June 18, 1874, passed an act, entitled "An act to authorize the issuance of patents for lands granted to the state of Oregon in certain cases," which after reciting that Congress had granted the state of Oregon certain lands, "to aid in the construction of certain military wagon roads in said state," and that "there exists no law providing for issuing formal patents for said lands," provided "that in all cases when the roads in aid of the construction of which said lands were granted *are shown by the certificate of the governor of the state of Oregon*, as in said acts provided, to have been constructed and completed,

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patents for said lands shall issue in due form, to the state of Oregon, as fast as the same shall, under said grants, be selected and certified, unless the state of Oregon shall, by public acts, have transferred its interests in said lands to any corporation or corporations, in which case patents shall issue from the general land office to such corporation or corporations, upon payment of the necessary expenses thereof; *provided*, that this shall not be construed to revive any land grant already expired, nor to create any new rights of any kind, except to provide for issuing patents for land to which the state is already entitled;" that Edward Martin, a resident of the state of California, placing confidence in the truth of the said certificate of the governor of Oregon, dated June 23, 1869, that the said road had been duly constructed, according to the requirements of said act of Congress, approved February 25, 1867, and placing confidence in the order of the commissioner of the general land office, dated December 28, 1869, withdrawing said lands from sale in favor of the Dalles Military Road Company, and believing that said act of Congress approved June 18, 1874, would be carried into effect by the issue of patents to the Dalles Military Road Company for all of said lands, did, on the thirty-first day of May, 1876, purchase in good faith, for a valuable consideration, to wit, the sum of one hundred and twenty-five thousand dollars, then paid by the said Martin to said Dalles Military Road Company, except such portions of it as had been previously sold by it; that previous to the time of paying said sum of one hundred and twenty-five thousand dollars, purchase money, and receiving said deed, the said Edward Martin had no notice of any failure on the part of the Dalles Military Road Company to construct and complete the said road, in accordance with the requirements of said act of Congress, approved February 25, 1867, and had no reason to believe that the same was not constructed in accordance with the said act of Congress, but on the contrary, he was informed and believed that said road had been so constructed, with width, gradation, and bridges, as to permit of its regular use as a wagon road; that thereupon said Martin became and was the *bona fide* purchaser of all said lands for a valuable consideration, and they were duly conveyed to him by

said corporation; and that by mesne conveyances all of said lands have been conveyed to defendant, the Eastern Oregon Land Company, with like good faith, and for a valuable consideration, and they are now held by said defendant, the Eastern Oregon Land Company. For hearing on exceptions to portions of bill for impertinence, see 40 Fed. Rep. 114.

Mr. L. L. McArthur, United States Attorney.

Mr. James K. Kelley, and *Messrs. Dolph, Bellinger, Mallory & Simon*, for defendants.

SAWYER, Circuit Judge (*after stating the facts as hereinbefore set out*). The pleas having been set down for argument by the complainant, for insufficiency, all the material allegations must be taken as true for the purposes of this decision. In my opinion, both pleas are good. The provisions of the act of Congress making the grant are as follows: "That there be, and hereby is granted to the state of Oregon to aid in the construction of a military wagon road alternate sections of public lands, designated by odd numbers, to the extent of three sections in width on each side of said roads." (Sec. 1.)

Section 2 provides, "that the lands hereby granted to said state shall be disposed of by the legislature thereof for the purpose aforesaid, and for no other."

Section 5 provides, "that *when the governor of said states shall certify to the secretary of the interior that ten continuous miles of said road are completed, then a quantity of the land hereby granted, not to exceed thirty sections, may be sold; and so on from time to time until said road shall be completed.*"

The state of Oregon, by an act passed October 20, 1868, granted the lands so granted to the state to the Dalles Military Road Company, upon the same conditions as in the grant to the state, the act of Congress being recited *verbatim*, in full, in the preamble to the act of the state.

The grant to the state, by the words "there be and hereby is granted to the state of Oregon," was a grant *in presenti*, passing a present title to the state, to be defeated only by breach of conditions subsequent, as has been repeatedly held by the

suprême court of the United States. (*Schulenberg v. Harriman*, 21 Wall. 44; *Leavenworth etc. R. R. Co. v. United States*, 92 U. S. 741; *Missouri etc. R. R. Co. v. Kansas Pac. Ry. Co.* 97 U. S. 491; *Wright v. Roseberry*, 121 U. S. 500; *Van Wyck v. Knevals*, 106 U. S. 360; *Railroad Co. v. Orton*, 6 Sawy. 198; *Francoeur v. Newhouse*, ante, p. 351.) The state act in like terms passed the present title, subject only to be defeated by breach of condition subsequent, to the Dalles Military Wagon Road Company. The act of Congress, also, designated the party, officer, or tribunal that should finally determine the question of fact, whether the road had been completed in accordance with the provisions of the statutory grant. Thirty sections were authorized to be sold, "when the governor of said state shall certify to the secretary of the interior, that any ten continuous miles of said road are completed, and so on from time to time until said road is completed." None appears to have been sold until the whole road was certified by the governor of Oregon, who alone was designated and authorized by the act of Congress to finally determine the matter, to have been fully completed in accordance with the requisites of the congressional grant. That the certificate was not made on completion of each section of ten miles of the road can make no difference. It is sufficient that it was made at one time, covering the completion of the whole road. The making of the certificate, on the completion of each ten miles, was authorized for the convenience and benefit of the grantee, and not of the United States. The intent of the government was to obtain the completion of the whole road. And that being completed, its object was fully attained. The authority to determine whether the road was completed was vested solely in the governor of Oregon, from whose decision there was no appeal. He was the agent of the United States, with full authority to determine the question, and his certificate of completion was to be the evidence, and the only evidence under the provisions of the statute, that the corporation has fully performed its part of the contract. His decision, therefore, in the absence of any such fraud as would vitiate it, is, necessarily, final and conclusive; and the government is estopped from denying its finality. This principle was

established in *Reichert v. Felps*, 6 Wall. 160, and *United States v. Speed*, 8 Wall. 83. When a special tribunal is authorized to hear and determine certain matters arising in the course of its duties, its decisions within the scope of its authority are conclusive. (*Johnson v. Towsley*, 13 Wall. 72.) And the same principle has been announced in numerous cases since. The right to a patent once vested is equivalent, as respects the government dealing with the public lands, to a patent issued. (*Stark v. Starrs*, 6 Wall. 402.) Now in this case the acts of Congress and of the state of Oregon, and the certificate of the governor, are public records, and the certificate of the governor having been made that the road had been fully completed in all respects as required by the granting act, the title already vested by the grant *in præsenti* became perfected and indefeasible upon the record in the absence of any such fraud as would defeat it. The verified plea, supported by the answer, avers that the certificate *was made without fraud*. The plea is, therefore, sufficient, and must be sustained.

The second plea, in addition to the matter stated in the first, alleges that the defendants are *bona fide* purchasers from the Dalles Military Wagon Road Company, without notice of any fraud or defect in the title, and that there can be no forfeiture as against them. In *Colorado Coal & Iron Co. v. United States*, 123 U. S. 307, a bill was filed to vacate several patents as having been obtained by fraud and perjury, in cases wherein there had, in fact, been no actual settlement or improvement on the land, although the evidence showed that there had been, it was held that the defense of a *bona fide* purchaser, without notice, is perfect. It was also held, that the burden of satisfactorily showing the fraud is on the complainant. So, in *United States v. Minor*, 12 Sawy. 164, it was held, that a purchaser of land, in good faith, for a valuable consideration, from a patentee of the United States, without notice, of any fraud affecting the title, is entitled to rely upon the record; and that a patent, if valid upon its face, will not be vacated as to him, for matters *dehors the record* of which he has no knowledge. Said the court: "The patent, which is the final record of the title (*Beard v. Federy*, 3 Wall. 491, 492), was regular and valid on its face.

The proper department of the government had examined the case on the evidence presented, adjudged the right to be in Minor, and issued the patent, accordingly, in due form. The patent could only be assailed by matter resting in parol *dehors* the record. Innocent parties were entitled to rely upon the record.” (*United States v. Minor*, 12 Sawy. 167.)

These observations are equally applicable to the present case. The two statutes, one of the United States and the other of Oregon, the certificate of the governor of Oregon, made in pursuance of the first-named statute, the act of 1874 authorizing the issue of the patents upon the governor’s certificate, as to the unpatented lands and these, together with the withdrawal of the lands from sale by the secretary and the patents so issued, as to all the lands patented, constitute the record, and upon this record purchasers were entitled to rely. The claim that purchasers could not rely upon this record, but that they must go over the road, and, at their peril, ascertain, for themselves, whether it had been completed in all parts in pursuance of the provisions of the statutory grant, is preposterous. The record shows upon its face that all conditions have been performed; that this has been so adjudged by the officer authorized to determine the fact, and the correctness of this determination is recognized by Congress in the act of 1874, directing patents to issue upon the certificates; and on that record the parties were entitled to rely. While innocent purchasers are thus protected upon undisputed equitable principles and authority, their rights are, also, expressly recognized and affirmed by the statute itself, under which this suit is brought, which provides, that the courts shall determine the questions, which they are authorized to consider in a manner “saving and preserving the rights of all *bona fide* purchasers of either of said grants, or of any portion of said grants, for a valuable consideration.” (25 U. S. Stats. 851.) Thus the statute itself recognizes the rights of innocent purchasers, if they had been otherwise doubtful. It is plain, therefore, that the second plea is sufficient, and must be sustained.

The remaining question to be considered, and the only one presented, upon which there is any room for doubt, is, whether complainants should be permitted to reply to the pleas, or

whether the bill should be dismissed? Upon the whole, after careful consideration, I think the bill should be dismissed. I think it in the highest degree probable that such would be the final result, whichever course is pursued. If so, the expense and annoyance of a long litigation would be fruitless. The governor of Oregon, upon whom alone was devolved the jurisdiction and duty to finally determine the fact as to the completion of the road, made his certificate on June 23, 1869, and, thereby, furnished record evidence of the complete and proper performance of all the conditions of the statutory grant, and that the title to the lands granted had become perfect, and indefeasible. He certifies that he makes the certificate after, and upon, a *careful personal examination of the road, since its completion*. Certainly, the public, and subsequent purchasers, were entitled to rely upon this careful, positive certificate of the party authorized, chosen, and designated to determine and certify the fact of completion. Five years afterwards, on June 18, 1874, without any proceedings having been taken to declare a forfeiture of the grant for breach of conditions subsequent, and without any complaint appearing to have been made, that said certificate of the governor was false, or that said road had not been fully completed, in all particulars, as was required by the granting act, and, while the government must have been, all the time, using the road for its various purposes designated in the act, Congress passed another "act to authorize the issuance of patents for lands granted to the state of Oregon in certain cases," wherein, after reciting, that "certain lands have heretofore by acts of Congress been granted to the state of Oregon, to aid in the construction of certain military wagon roads in said state," it was provided "that *in all cases* when the roads, in aid of the construction of which said lands were granted, *are shown by the certificate of the governor of the state of Oregon, as in said acts provided, to have been constructed and completed*, patents for said lands *shall issue in due form* to the state of Oregon, as fast as the same shall, under said grants, be selected and certified, *unless the state of Oregon shall by public act have transferred its interests in said lands, to any corporation or corporations, in which case the patents shall issue from the general land office to*

such corporation or corporations, upon their payment of the necessary expenses thereof; provided, that this shall not be construed to revive any land grant already expired, nor to create any new rights of any kind, except to provide for issuing patents for lands to which the state is already entitled.” (18 Stats. 80.)

The state in this case had so transferred its interest to the Dalles Military Road Company. By this act, Congress directed that patents shall issue, “*in all cases,*” not, *when the roads have, actually, in fact, been completed as required by law, but “in all cases,” when “the roads” “are shown by the certificate of the governor of the state of Oregon as in said acts provided, to have been constructed and completed.”* Now, in this case, after waiting five years after the certificate of completion, made upon personal examination by the governor, having all the means of ascertaining whether it was false or true, Congress, positively, in effect, *affirmed its truth*, by this provision of the act. It determined the fact of the performance of the conditions of the grant by directing, in terms, patents to be issued “*in all cases*” *when the certificate had been issued.* This provision is not permissive merely, but mandatory. The closing paragraph in the proviso would operate only upon any lapsed grant, if any there was, by failure to complete in the required time, or when the work was not all completed, and when no certificate had been issued, or when certificates for only a part had been made. But it, necessarily, recognizes, that, “*in all cases*” when the certificate of the governor had been issued, the conditions have been performed, and the grantee has become entitled to a patent. The statute in effect, confirms, by legislative act, the judicial act of the governor, in ascertaining and certifying the completion of the work. I know of no case, where a legislative grant, or act, has been investigated, and set aside, by the courts, on the ground that its passage had been secured by imposition or fraud, upon the legislative body passing the law. In *Tameling v. United States*, 93 U. S. 644, it was held that the action of Congress confirming a private land claim in New Mexico is not subject to judicial review. In the present case, the road must, necessarily, have been used by the government during these many years for those purposes, which were of so urgent a character, as to induce

Congress to make the grant in aid of its construction, or else the failure to complete it, in such manner, that it could be so used, must, inevitably, have come to the knowledge of the government and Congress. With this knowledge, necessarily, had, the act of 1874 was deliberately passed. Congress exercised its discretion upon such information as it had, in requiring the issue of the patents upon these certificates of the governor, and that is the end of the matter. It is a legislative recognition and affirmation of the correctness of the certificate of the governor of Oregon. (See, also, *Ryan v. Carter*, 93 U. S. 78.)

It seems to me, also, that the cause of suit ought to be regarded as stale, so as to render it inequitable, under the circumstances of the case, to prosecute it now within the established principles of equity jurisprudence. Fifteen years elapsed after the affirmative and confirmatory action of Congress in directing, in mandatory language, the issue of the patents to lands "in all cases" when the certificate of the governor had been made, and twenty years after the date of the certificates now claimed to have been fraudulently issued, had elapsed before the passage of the act authorizing the bringing of this suit. It is a well-known historical fact, familiar to every citizen of Oregon, that the governor himself who made the certificate in this case, and the governors who made them in the following case, are both dead, as well, doubtless, as many of the other parties to the transactions. At this day, it would, doubtless, be difficult to establish by sufficient affirmative testimony, any actual fraud, if any there was. Although statutes of limitations do not run against the United States, and would not be available in an action at law, it seems to me, that the case is a proper one for the application of the principle that it would be inequitable to enforce a stale claim, and that a court of equity would not, on that ground, now declare a forfeiture. Had the land grant been made for the same purposes, and upon the same conditions, by a private citizen, and the subsequent action both of the grantee and grantor been precisely the same as in this case, there can be little doubt, I apprehend, that a court of equity, in view of all the circumstances, would, at this late day, refuse to decree a forfeiture, and to restore the lands to the grantor for

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Opinion of the Court—Sawyer, C. J.

breach of the conditions subsequent, on the ground that it would be inequitable to enforce so stale a claim against parties who had subsequently purchased, in full view of the affirmative public action, as well as the non-action of the grantor, and thereby had good reason to suppose, that all the conditions of the grant, whether in fact well performed, or not, had been satisfactorily performed. (*Bowman v. Wathen*, 1 How. 189; *Piatt v. Vatter*, 9 Peters, 416; *Badger v. Badger*, 2 Wall. 93; *Sullivan v. Sullivan etc. Co.* 94 U. S. 811; *Clarke v. Boorman's Ex'r*, 18 Wall. 509.) Whatever is inequitable, as between man and man, in their dealings with each other, should, also, be deemed inequitable, as between the United States, and those with whom they condescend to deal, under like circumstances; and I take it, that the same decree is proper in this case, that would have been proper had a private party been the grantor, and had he by both his positive affirmative action, and his non-action, for so long a time, given purchasers from his grantee so good reason to believe that he was fully satisfied with the performance of the conditions of the grant.

In my judgment, all subsequent purchasers were entitled to rely, implicitly, upon the certificate of the governor, who was alone authorized to determine the fact of the completion of the road, and, especially, after its confirmation by Congress in the act, peremptorily requiring patents to issue in all cases where certificates had been, in fact, issued. *If there were suspicious circumstances before the passage of this act, which purchasers might be called upon to notice, the passage of this act assured them that Congress had informed itself of the action of the state, and its grantees under it, and was satisfied as to the full performance of the work, or, at least, if it found any defects or shortcomings, that they were waived, and the work accepted.* Martin purchased of the Dalles Company two years after the passage of the act of 1874, and was therefore a subsequent purchaser. Subsequent purchasers, certainly, had a right to rely upon the action had from time to time by Congress, and its agents duly authorized, and the public record of it so made. It is now estopped from alleging the non-fulfillment of the statutory conditions of the grant. Let the bill be dismissed.

UNITED STATES v. OREGON CENTRAL MILITARY ROAD CO.

CIRCUIT COURT, DISTRICT OF OREGON.

FEBRUARY 20, 1890.

Before SAWYER, Circuit Judge.

In equity.

Mr. L. L. McArthur, United States Attorney, for complainants.

Mr. James K. Kelley, and Messrs. Dolph, Bellinger, Mallory & Simon, for defendants.

SAWYER, Circuit Judge. This case, in nearly all respects, is similar to that just decided, *United States v. Wagon Road Co. ante*, page 387. The principal difference between the cases consists in the fact, that in this case, the certificates of the governor, of completion, are made on the completion of each section of fifty miles, and the act authorized the sale of thirty sections of the land *before any work was done*, and of thirty more upon the certificate of the governor of the completion of each ten miles of the road, till the whole should be completed. The first certificate, that fifty miles had been completed, was made by Governor Gibbs, and the subsequent certificates by Governor Woods, who made the certificate in the other case. So also, in this case, *the governor is not charged with acting fraudulently* in issuing the certificates, as he was in the other. If this case, as is contended on this account, is brought within the decision of *United States v. Flint*, *United States v. Throckmorton*, and *United States v. Carpentier*, 4 Sawy. 42, and the same cases affirmed on appeal, 98 U. S. 68, it stands in a stronger position than the other, for in that view, since the officer to determine the question was no participant in the fraud, his decision is conclusive, and unassailable even in equity. However the rule may be, as applicable to this case, the pleas must be held sufficient, and the bill dismissed, for the reasons stated in the case of *United States v. Wagon Road Co. ante*, page 387, and it is so ordered.

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Statement of Facts.

UNITED STATES v. NORTHERN PAC. R. Co. ET AL.

CIRCUIT COURT, DISTRICT OF OREGON.

MARCH 1, 1890.

1. **PUBLIC LANDS—RAILROAD GRANT—NORTHERN PACIFIC—LOCATION OF ROUTE.**—Act of Congress of July 2, 1864, granted public lands to the N. P. R. Co., and authorized it to construct a continuous line from Lake Superior, westerly, by the most eligible route, to be determined by said company within the United States, and on a line north of the forty-fifth degree of latitude to some point on Puget Sound, with a branch via the valley of the Columbia River to a point at or near Portland, Or. *Held*, that it was optional with the company whether it would build the branch to Portland. The clause giving it authority to do so did not limit its right to choose any route within the prescribed limits between Lake Superior and Puget Sound.
2. **IDEM—APPROVAL OF LOCATION.**—Act of Congress of May 31, 1870, authorizing said company to locate and construct, under the provisions, and with the privileges and grants provided in its act of incorporation (Act Cong. July 2, 1864), its main line to Puget Sound via the Columbia River, etc., is an approval and confirmation of the location of its line theretofore made by the company from Lake Superior via the Columbia River and Portland to Puget Sound.
3. **IDEM—GRANT IN PRÆSENTI.**—The donation of land to said company under act of Congress of July 2, 1864, was a grant *in præsentis*, and took effect as of that date upon the subsequent location by the company of its road, and approval thereof by Congress.
4. **IDEM—EFFECT OF DONATION—FILING OF MAP.**—Section 6 of said act provides that the President shall cause the lands to be surveyed for forty miles on each side of the entire line of the road after the general route shall be fixed, "and the odd sections of land hereby granted shall not be liable to sale, entry, or pre-emption before or after they are surveyed, except by said company." *Held*, that the act withdrew the lands from liability to pre-emption after the route should be fixed; and on the filing by the company of a map of the route with the secretary of the interior the grant became certain, and attached to the odd sections of the land within the forty-mile limit.
5. **IDEM—NEGLECT OF SECRETARY OF THE INTERIOR.**—When the route was adopted by the company, and a map designating it was filed with the secretary of the interior, the route became fixed, within the meaning of the act; and no subsequent neglect of the secretary could affect the rights of the company.

Before SAWYER, Circuit Judge.

At law.

This is a suit to recover the value of timber cut in 1886 upon the northwest quarter of section 17, township 18, range 4 west of the Wallamet meridian, alleged to be public lands. The defense, is, that the said land was not public land, but was owned in fee-simple by one Aaron Kinney, and that the timber was cut by the authority of said Kinney. The ownership of the land is the main issue in the case. The land was claimed

by the Northern Pacific Railroad Company to be a portion of the land granted to it by the act of Congress of July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific coast, by the northern route." (13 Stats. 365.) The lands granted by this act were conveyed to trustees by trust-deed in due form, to secure bonds issued by the corporation to raise moneys to build the road, with power to sell, bearing date July 1, 1870. The trust-deed was made by authority of a joint resolution of Congress approved May 31, 1870. (16 Stats. 378.) The trustees conveyed the land in question to James B. Montgomery on September 9, 1870, and by subsequent conveyances, whatever title vested in the Northern Pacific Railroad Company by said act and joint resolution of Congress so conveyed to Montgomery because vested in said defendant, Aaron Kinney, and was in him at the time the timber in question was cut and removed. The timber was cut by authority of defendant, Kinney.

On March 6, 1865, in pursuance of the provisions of the said granting act of July 2, 1864, the president of the Northern Pacific Railroad Company, by direction of the company, forwarded to the secretary of the interior a map of the general route of the road from a point on Lake Superior to a point on Puget Sound, and in an accompanying communication said: "Under authority from the board of directors of the Northern Pacific Railroad Company, I have designated on the accompanying map, in red ink, the general line of their railroad from a point on Lake Superior in the state of Wisconsin, to a point on Puget Sound in Washington Territory, via the Columbia River, adapted by said company as the line of its railroad, subject only to such variations as may be found necessary after more specific surveys," and asking that the lands granted to the company be withdrawn from sale in conformity with law. No action was taken by the interior department upon this map, or the accompanying request. The line of the route indicated ran in a westerly direction; was wholly north of the forty-fifth degree of north latitude, and within the territory of the United States. On August 13, 1870, the same company filed with the

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secretary of the interior, and with the commissioner of the land office, another map showing the general route of its main line from a point on Puget Sound following almost identically the same route as that indicated on the map filed March 6, 1865, and on the day of filing this last map, August 20, 1870, twenty sections of land per mile on each side of the line indicated by said map were withdrawn from sale by the secretary of the interior for the benefit of the said company, and on September 13, 1873, said company duly filed its map of definite location of the line of said road from Kalama to Tenino in Washington Territory, a distance of sixty-five miles. In 1871, 1872, and 1873 said railroad company constructed and completed its line of road from Kalama on the Columbia River, in Washington Territory, in a northerly direction to Tenino, a distance of sixty-five miles, forming a portion of a direct line of road since completed, from Portland, Oregon, to Tacoma, on Puget Sound, in said territory, the western terminus of said road. That portion of the railroad from Portland, up the Columbia River, to a point where the Northern Pacific Railroad strikes the Columbia, has never been constructed by said company. The land in question is within Washington Territory, north of the forty-fifth parallel of north latitude, and is within forty miles of the line selected by the Northern Pacific Railroad Company for the *main line of its road* from Lake Superior to Puget Sound by way of the valley of the Columbia River, as indicated on the map forwarded to the secretary of the interior by said company on March 6, 1865, and is within forty miles of the line selected as the main line of its road down the Columbia River to Puget Sound, as indicated on said map filed with the secretary of the interior on August 13, 1870, and is within forty miles of the line of the road as definitely located and now constructed from Kalama to Tenino and Tacoma on Puget Sound. The road as constructed from Tacoma to Portland runs for about half its distance by way of the valley of the Columbia River to Portland, the whole length of the said portion of the road being one hundred and five miles. After the withdrawal by the secretary of the interior of said lands, in the interest of the Northern Pacific Railroad Company, on August 13, 1870,

the land department at Washington and the department of the interior refused all applications for settlement, north of the Columbia River, within the limits of the said grant to the Northern Pacific Railroad Company, until the ninth day of November, 1885. The tract of land in question, together with other lands was listed by the Northern Pacific Railroad Company, on March 31, 1885. On November 9, 1885, the general land office rejected the said list, including the land in question, so made by the Northern Pacific Railroad Company; and on October 29, 1887, the department of the interior, on appeal affirmed the rejection. The land in question had been withdrawn from sale by the land department, and the Northern Pacific Railroad Company had definitely located, constructed, and put in operation its road from Kalama to Tacoma, at the time it executed by its trustees its deed to said land in question to J. B. Montgomery, the grantor of the defendant Kinney. In 1870 there was a corporation existing in Oregon, organized for the purpose, as expressed in its articles of incorporation, of building a railroad from Portland, Oregon, through the Wallamet valley, to the southern boundary of the state. An act of Congress was passed May 4, 1870, granting lands to this company to aid in the construction of a road from a point near Forest Grove, on its road to the southern boundary of the state, to Astoria, this not being a part of the road designated in its articles of incorporation. (16 Stats. 94.) The Oregon Central Railroad Company filed its acceptance of the grant May 4, 1870, and its map of definite location from Astoria to Castor Creek, near Forest Grove, on January 31, 1872, but it has constructed no part of this line so located. The land in question lies within twenty miles of the line indicated in this map of location, but it is on the north side of the Columbia River, in Washington Territory, now a state. On January 31, 1885, Congress, for failure to build the road, passed an act declaring the said grant to the Oregon Central Railroad Company forfeited. (23 Stats. 206.)

Mr. Louis L. McArthur, United States Attorney.

Mr. Rufus Mallory, for defendants.

SAWYER, Circuit Judge (*after stating the facts as above*). The language of the act authorizing the Northern Pacific Railroad Company to construct a railroad is: "Said corporation is hereby authorized and empowered to lay out, locate, construct, furnish, maintain, and enjoy a continuous railroad and telegraph line, with the appurtenances, namely, beginning at a point on Lake Superior, in the state of Minnesota, or Wisconsin; thence westerly by the most eligible railroad route, as shall be determined by said company, within the territory of the United States, on a line north of the forty-fifth degree of latitude, to some point on Puget's Sound, with a branch, via the valley of the Columbia River, to a point at or near Portland, in the state of Oregon, leaving the main trunk-line at the most suitable place, not more than three hundred miles from its western terminus." (13 Stats. 366.)

The controlling question presented, is, whether, upon reaching the Columbia River, instead of crossing the Cascade Mountain Range between the Columbia and Puget Sound, upon finding a more eligible route for its road, the company with its road could follow down the Columbia River valley to and past Portland, cross over, and go north to Puget Sound, thereby altogether dispensing with its branch to Portland. In my judgment it was fully authorized to do so. The object of Congress was to have a railroad constructed from some point on Lake Superior, to some point on Puget Sound, and *upon the most eligible route*. No survey had yet been made in such manner as to determine the most desirable route. It was probably supposed that some reasonably practicable route might be found over the mountain range, and in that case it would probably be adopted. In that case also, it would be important to have a connection with Portland, the largest town in this new northwest. But Congress put no such limitation as to the route upon the corporation. The language of the act is broad and comprehensive, with but the few limitations expressed, and Congress, doubtless, expressed the limitations as it intended them to be. It authorized the corporation to "lay out, locate, and construct . . . a continuous road." It was limited as to its beginning to some point on Lake Superior, but it might be in either Wisconsin, or Minne-

sota, leaving the largest discretion in the company to determine the starting-point. Having determined this point, the road was to run "thence westerly by the most eligible railroad route, as shall be determined by the company." But it is to be "within the United States," and "on a line north of the forty-fifth degree of latitude, to some point on Puget Sound." These were the only limitations put upon the company's authority to locate its road. The corporation was to select the terminus on the sound, as well as the point of commencement. It was to select the "most eligible railroad route," and the question of eligibility is to "be determined by said company," within the prescribed limits. It would be difficult to confer this authority in more specific, comprehensive terms. The company selected the route which appeared to it to be most eligible, after actual survey. It located its eastern terminus on Lake Superior, then ran its route in a westerly direction to the Columbia River, down that river, through Portland to Kalama, on the Columbia, then up the valley of another river to a point on Puget Sound. This route, from the point selected, on Lake Superior, to the point selected on Puget Sound, fulfilled all the requirements of the act of Congress. It ran in a westerly direction, from Lake Superior to Puget Sound; it was the route "determined by said company" after thorough examination to be "the most eligible." It was all "within the territory of the United States," and was "on a line north of the forty-fifth degree of north latitude," all the way to the "point on Puget Sound." The line selected, therefore, in every particular fulfilled all the requirements and conditions of the statutory grant. It is true that the selection of the line obviated the necessity of building a branch to Portland, as the main line itself adopted carried the road to and through Portland. Both objects of Congress were accomplished by one main line, no longer than a main line on the other route and the branch together, if so long. But the company did not obligate itself to build a branch road to Portland at all. It simply had the right—an option—to do so had it been necessary or desirable. So, as there was water communication between the point where the main line thus selected struck the Columbia River and Portland, and there was less need for haste on this

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section, in the construction of the road, the company found it more advantageous, economical, and speedy to build the road on the two ends from Lake Superior, to the Columbia, and from Portland to the sound, so those divisions of the road were first built and completed. If the company has failed to construct the division between Portland and the point where the eastern division intersects the Columbia River, it is, doubtless, for the reason, that, while it was expending its energies and resources in the construction of these two divisions, eastern and western, another company stepped in and built the road up the Columbia River from Portland to a junction with the divisions of the road extending from Lake Superior to the Columbia. It seems clear that the company was authorized by the act of Congress to locate its main line as it did. I do not think the authority to construct a branch by the valley of the Columbia to Portland is any limitation of the right of the company to select what it deemed, upon examination, to be the most eligible line for its main road, within the limits expressly designated. It is not a limitation in terms, and it would be a strained construction to infer such a limitation from language so indefinite, where the other provisions of the act are so explicit. It simply is a grant of a right to make a branch, also, had it been necessary or desirable.

And Congress itself, in its resolution of May 31, 1870, before any location by the Oregon Central Railroad Company (16 Stats. 378), recognized and approved this location of the main line as having been properly made, after it had been adopted by the company, that resolution "authorizing the Northern Pacific Railroad Company to issue its bonds for the construction of its road and to secure the same by mortgage, and for other purposes." This resolution, in addition to empowering the company to issue bonds and mortgage its land, also authorized it "to locate and construct under the provisions and with the privileges, grants, and duties provided for in its act of incorporation (the said act of 1864) its main road to Puget Sound via the Columbia River, with the right to locate and construct its branch from some convenient point on its main trunk-line across the Cascade Mountains to Puget Sound." Could there

be a plainer recognition and approval of the location of the main line down the Columbia River as having been properly made under the provisions of the incorporation act? This is a legislative construction of the act, corresponding to that given to it by the corporation. At all events it confirms the locations, and confirmation relates back to the date of the location and even to the date of the act. I feel no hesitation in saying that the location was legally and properly made under the act, and if not, that this resolution confirms it. The grant, then, dates from July 2, 1864.

The first map of general location of this portion of the line was filed in the interior department in March, 1865. True the secretary of the interior did not on this occasion give notice of a withdrawal of the lands from pre-emption sale, etc. But then the statute did not require him to do so. But section 6 provides that "the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed and as fast as may be required by the construction of said railroad, and the odd sections of land hereby granted shall not be liable to sale, or entry, or pre-emption before or after they are surveyed, except by said company, as provided in this act." Thus the act itself withdrew the lands upon the filing of the map or "after the general route shall have been fixed," which was done by the filing of the map of the route selected. The company, by filing the map, had indicated its line, and the grant, before uncertain, now became certain, and attached to the odd sections of the land within the forty-mile limit. No notice was required to be given by the secretary. (*Buttz v. Northern Pac. Co.* 119 U. S. 55; *Denny v. Dodson*, 13 Sawy. 84.) But if notice had been provided for, the failure of the secretary to act would not have affected the rights of the company after it had performed its part. The neglect of the secretary of the interior would not impair the company's rights. (*Van Wyck v. Knevals*, 106 U. S. 366.) And in this case, as we have seen, "after the general route shall be fixed," the odd sections are not liable to grant to any other party, and the general route was fixed within the meaning of the act on the filing of the

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map in March, 1865. Another map, designating the same line, was filed August 13, 1870, upon which, upon the same day, the secretary of the interior formally withdrew the lands, and issued his notice, and the road was actually constructed and completed on this line in the years 1871, 1872, and 1873. The title, therefore, became indefeasible, the conditions subsequent as to this part of the line having been fully performed. The grant to the Oregon Central Railroad Company was not made till May 4, 1870, long after the grant to the Northern Pacific Company, and the filing of its first map of general location. And it did not file its map of location till January 31, 1872, when for the first time it became definite. This was long after the filing of its second map by the Northern Pacific Company, and long after the passage of the resolution of Congress of May 31, 1870, recognizing and approving the location of its main route via the Columbia River, and adjacent to the land in question; and if there was any defect before, the approval operated by relation and took effect from the date of the first act, and the location under it. Besides the Oregon Central Railroad Company never built the branch of its road, or any part of it, and Congress passed an act declaring its right, whatever it was, forfeited, on January 31, 1885. The grant to the Northern Pacific Railroad Company, therefore, first attached, and there was nothing left upon which the grant to the Oregon Central could operate, either at the date of the filing of its map of location in January, 1872, or at the date of the granting act, May 4, 1870. It does not appear that the Northern Pacific Railroad Company ever accepted or acted under the joint resolution of April 10, 1869 (16 Stats. 577), and it is understood that it did not, but declined to accept it. There is no presumption without evidence that it did accept any rights under it.

The grant to the Northern Pacific Railroad Company was a grant *in presenti*, subject only to be defeated by a failure to perform the conditions subsequent, and by proper proceeding taken on the part of the United States to divest the title and revest it in the government. But the conditions having been fully complied with, so far as this portion of the road was concerned, the title has now become perfect and indefeasible. The

Points decided.

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title is now, and it was at the time of the cutting of the timber in question, perfect in the defendant Kinney, the holder of the title of the grantee of Northern Pacific Railroad Company.

As to the last point, I have recently gone over the whole subject in the case of *Francoeur v. Newhouse*, ante, page 351, and cited the numerous authorities on the points decided to which, and the authorities therein cited, reference is made without going over the subject again. See, also, the opinion of Mr. Justice FIELD in *Denny v. Dodson*, 13 Sawy. 69, and the opinion of this court in *United States v. Dalles M. Road Co.* ante, page 387.

The result is, that the plaintiffs had no title to, or interest in the land in question, at the time of the timber cutting complained of, and there must be judgment for defendants. It is so ordered. Let the finding of fact be in accordance with the statement preceding this opinion, and in the stipulation of the parties, as to the facts, on file in the case.

WALRATH v. PACIFIC PAV. CO.

CONSOLIDATED BITUMINOUS ROCK CO. v. WALRATH.

CIRCUIT COURT, NORTHERN DISTRICT OF CALIFORNIA.

MARCH 4, 1890.

1. PATENTS FOR INVENTIONS—EXTENT OF CLAIM—PROCESS FOR WORKING ASPHALTUM. — *Held*, on the evidence adduced, that letters patent No. 319,125, for a process of working and using asphaltum, granted to Judson Rice, Andrew Steiger, and Isaac L. Thurber, on June 2, 1885, are valid; but must be limited to a process in which the bituminous material is placed in a vessel with water and the two are boiled together, during which process steam is generated from the water, and permeating the bituminous material disintegrates it, the claim of the patent being in effect a claim for the use of water and steam combined.
2. IDEM—PRIOR STATE OF ART—PROCESS FOR WORKING BITUMINOUS SAND-ROCK. — *Held*, on the evidence adduced, that letters patent No. 342,852, for a paving, roofing, and building compound, granted to Austin Walrath on June 1, 1886, are valid; but in view of the state of the art, must be limited to a process in which the bituminous material is placed alone in one vessel, and steam is generated in another and distinct vessel, and conveyed therefrom by a pipe into the mass of bituminous material, so that said steam will permeate and thereby disintegrate the bituminous material.

Before SAWYER, Circuit Judge.

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Statement of Facts.

In equity.

Bill for the infringement of two letters patent, one numbered 319,125, granted to Judson Rice, Andrew Steiger, and Isaac L. Thurber, on June 2, 1885, entitled "Process of Working and Using Asphaltum," and the other numbered 342,852, granted to Austin Walrath, on June 1, 1886, entitled "Paving, Roofing, and Building Compound." The material portions of the specification of the first patent are as follows:—

"There are large bituminous deposits in California known as 'asphaltum,' which is used for various purposes, but principally for roofing buildings, in paving streets and sidewalks, and for basement floors. The only process for working asphaltum heretofore in use has been to heat it in an open iron receptacle with coal-tar or some oily substance or ingredient, and when in a liquid state to mix it with gravel or coarse sand, and subject the combination to an intense heat until thoroughly 'cooked,' and then to apply it in a dissolved or liquid state to the uses for which it was intended. By this process the natural qualities of the asphaltum were destroyed, the action of the fire volatilizing and evaporating portions of its valuable constituents, rendering it brittle and porous, and when exposed to the heat of the sun, or to moisture of any kind, it would crumble and decompose. The object of our invention is to prepare asphaltum for the purposes of roofing buildings, for paving streets and sidewalks, for basement floors, and all other purposes for which it is now commonly used by a new process heretofore unknown or used, and to preserve the natural elastic and adhesive properties contained in asphaltum in its native state without the addition of coal-tar, oil, or any other oily substance whatever, and to reduce the expense of handling it. To carry out our invention, we take the asphaltum in its native state and soften or dissolve it by the aid of hot water, steam, or superheated steam, and when dissolved or in a plastic state to apply it to the uses for which it is intended. We then press it with a heavy iron or rollers heated for that purpose, but not to a temperature that would burn the material, which gives it a smooth surface and renders it compact and solid. When the

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asphaltum is dissolved or softened by our process, clean sand may be added, if desired, to give it the proper consistency; but without the addition of sand or other ingredient we can also use asphaltum by our process for making floor tiling by placing the material in moulds and subjecting it to pressure which gives it a firm, solid form with a smooth surface, which is susceptible of a fine polish. In our process of working asphaltum we use an ordinary steam-boiler for supplying the hot water, steam, or superheated steam, and a close or open vessel, stirring by hand or by machinery. Having fully described our invention, what we claim as new, and desire to secure by letters patent of the United States, is: The process of preparing roofing and paving material, consisting in the following steps: *First*, softening pure native asphaltum by the application of hot water or steam thereto; and *secondly*, pressing it under heated rollers or other heated irons, substantially as and for the purpose set forth."

The material portions of the specification of the second patent are as follows:—

"My invention has for its object the production of a new pavement, roofing, and building material or compound which possesses in a superlative degree all those qualities which are recognized as being necessary in material to be used for those purposes. The base of my compound is a new natural product which has recently been discovered near Santa Cruz, in California. This substance or material is found in the shape of a deposit or mine, and is called 'bituminous sand-rock,' and no other deposit of such material has ever been discovered within my knowledge. The material or substance seems to have once been a sandstone, but by some process of nature it became saturated with petroleum oil, and possibly other substances, so that in its crude state it presents a dark, granular appearance. It is tough, flexible, and tenacious, and has a strong smell of petroleum. By subjecting it to heat the oil can be driven off, and it then becomes hard, like iron, and upon the application of fire to this iron-like substance gases escape, which burn with a blue flame, leaving nothing but sand as a residue. To manufacture my paving, roofing, and building compound, I

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take this bituminous sand-rock and heat it by means of steam in a suitable vessel, which may be either open or closed. When sufficiently softened by the steam, it will be in a semi-liquid condition, so that it can be spread by suitable raking implements in a thin course or layer over the surface to be paved or roofed. I then roll and smooth it down with heated irons until it has become firm, and until the water which it has taken up from the steam and the volatile part of the oil have evaporated, which will leave a firm, hard, but elastic surface that will wear a great length of time. For building purposes, and for one class of paving, I convert the bituminous sand-rock into bricks or blocks of the desired size. In this case I treat the sand-rock with steam, as above specified, and in addition I add some earthy or mineral substance—such as sulphate or carbonate of lime—so as to give it density and body, and then I subject it to pressure in moulds, thus forming blocks or bricks, which can be used for paving or building purposes. Having thus described my invention, what I claim, and desire to secure by letters patent, is:—

“1. The process of treating bituminous sand-rock with steam, for the purpose above described.

“2. The process of forming pavements or roofs of bituminous sand-rock, which consists in softening the rock by treating it with steam and rolling or ironing it with hot irons to a firm surface, substantially as described.

“3. Bricks or blocks for paving and building purposes, composed of bituminous sand-rock softened by steam and mixed with earthy or mineral substances, and subjected to pressure in moulds, substantially as described.

“4. A paving composition consisting of bituminous sand-rock softened by steam, substantially as described.”

Messrs. Scrivener & Boone, for complainant in first case, and respondent in second case.

Mr. M. A. Wheaton, for respondent in first case, and complainant in second case.

SAWYER, Circuit Judge (*orally*). I have examined these two cases with care. The first case is a suit by Walrath to restrain

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the Pacific Paving Company, the defendant in that suit, from infringing upon his letters patent for a process of treating bituminous sand-rock for paving purposes. The second suit is a counter-suit which was instituted by the Consolidated Bituminous Rock Company against Walrath, charging him with infringing upon certain prior patents of which it is the assignee. Both cases are represented by the same counsel and both have been submitted on the testimony taken in the first case. The Walrath patent purports to be a patent for treating bituminous sand-rock for paving purposes, while the other speaks only of asphaltum. It is evident, however, that both patents refer to the same material, because both parties use the same material from the same mine. And it was not inconsistent with this interpretation that the elder patent refers to the material as asphaltum, since it is shown that it actually contains asphaltum, as one of its component parts.

Upon examination I think both of these patents are valid, since the process described in them are different. Both patents refer to steam as the effective agent for reducing the material, but the patentees produce the steam and utilize it in a different manner. In the prior patent owned by the Consolidated Bituminous Rock Company, the water is poured into the kettle with the material to be dissolved and both are boiled together. During the boiling steam is generated, which passes up through the bituminous material in the kettle partly dissolving it, and the water is got rid of in part in this way. In this elder patent the claim covers the use of both *water and steam*, and this is the process the patentee of that patent used. They never used any other until after Walrath obtained his patent and commenced to use his process. I think the process covered by this elder patent is a patentable process, and I think the patent is *good and covers the use of steam generated in that mode*. The subsequent patent to Walrath is also for an improvement in processes for treating bituminous sand-rock. Instead of putting the material in water and boiling the two together, thereby generating the steam in the same vessel, *he generates the steam in a separate boiler or vessel*, and dispenses with the use of water in the same kettle or vessel, which seems to be an improvement. It must

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be an improvement because the patentees of the prior patent adopted this latter mode and proceeding after Walrath had demonstrated its value. I think, therefore, there must be a decree in both cases, in the one case a decree enjoining the defendant Walrath from using steam in the mode applied by the patentee of the prior patent, and in the other case, viz., *Walrath v. Pacific Paving Company*, I think Walrath has a valid patent for the improvement in generating steam in an outside vessel and conveying the steam alone to the material to be dissolved.

Mr. Boone. Did your honor take notice of the fact that there was a license; that the Walrath Company had a license to use the prior patent?

The Court. I do not think Walrath infringed while he had that license. It is only what he has done since the expiration of that license.

Mr. Boone. What he has done since then by boiling the material with water in an open kettle and generating steam in that way?

The Court. Yes.

Mr. Wheaton. Is it intended to limit the decree to the use of the open vessel?

The Court. No; either open or closed.

Mr. Boone. In the first patent issued to Judson and Rice they practiced it, and they never used it in any other way except in an open kettle, until Mr. Walrath patented it and used his process of generating steam outside.

The Court. They do not limit their claim to an open kettle. They put the material in the kettle and boil it and generate the steam in the same vessel. That is their invention. I do not suppose it matters whether the kettle was open or closed.

Mr. Wheaton. In the *Walrath Case* the complaint does not charge an infringement before the bringing of the suit. I suppose an injunction follows in that?

The Court. Then there is no occasion for anything but an injunction.

Mr. Boone. We asked for an accounting.

The Court. There is no occasion for an accounting in the

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Walrath Case if the complaint shows that the defendant in that case had only threatened to use the process.

Mr. Boone. All we ask for is an injunction, that is sufficient.

The Court. Very well.

Mr. Wheaton. I presume both parties have contracts on hand and I ask that the injunction be suspended thirty days.

Mr. Boone. We have no objection.

The Court. Very likely you will be able to arrange it among yourselves when you find out what your rights are. That is the main proposition, to ascertain your rights.

UNITED STATES v. TERRY.

DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA.

MARCH 11, 1890.

1. **RESISTING OFFICER—"KNOWINGLY AND WILFULLY"—INSTRUCTION.**—Where defendant, under indictment for resisting an officer, alleges that she did not knowingly and wilfully resist the officer in the execution of an order to remove her from the court-room, for the reason that she was rendered unconscious by the opinion of the court then being pronounced, the jury may consider the fact that she entered the court-room with a loaded revolver, to hear the decision in a case to which she was a party.
2. **IDEM.**—If defendant knew the order for her removal from the court-room was directed to the marshal, it is immaterial that the court addressed it to the clerk if he immediately changed it to the marshal.
3. **IDEM—UNNECESSARY FORCE AND VIOLENCE.**—Any unnecessary force or violence used by an officer in the execution of an order to remove one from the court-room may be resisted by force sufficient to overcome it.
4. **IDEM—MARRIED WOMEN—PRESUMPTION.**—The presumption that a married woman committing a misdemeanor acts under coercion of her husband, may be overcome by circumstances showing that he, though in the same room, exercised no control over her.

Before Ross, District Judge.

Indictment against Sarah Althea Terry for resisting, by assaulting, an officer, in the execution of an order to remove her from the court-room.

Mr. John T. Carey, and *Mr. Davis Louderback,* for United States.

Mr. Patrick Reddy, and *Mr. W. W. Foote,* for defendant.

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ROSS, J. (*charging jury*). The statute upon which the indictment in this case is founded provides that "every person who knowingly and wilfully obstructs, resists, or opposes any officer of the United States in serving, or attempting to serve or execute, any mesne process or warrant, or any rule or order of any court of the United States, or any other legal or judicial writ or process, or assaults, beats, or wounds any officer, or other person duly authorized, in serving or executing any writ, rule, order, process, or warrant, shall be" punished in a certain prescribed way. The indictment charges, in effect, that at a certain stated time and place the defendant knowingly, wilfully, and unlawfully resisted, obstructed, and opposed, by assaulting, beating, and wounding J. C. Franks, at the time being United States marshal for the Northern District of California, in the execution of an order then and there made by the United States circuit court for said district, addressed to the said marshal, and directing him to remove the said defendant from the court-room of said court because of her gross misbehavior therein.

To convict the defendant, you must be satisfied from the evidence, beyond a reasonable doubt, that the order made by the court, and referred to in the evidence, directed the marshal to remove the defendant from the court-room, and that in the execution of such order the defendant knowingly and wilfully resisted the marshal, by assaulting, beating, or wounding him. The words "knowingly" and "wilfully," employed in the statute defining the offense with which the defendant is charged, imply that she must have known that the order directed the marshal to remove her, and, knowing such fact, that she determined, with a bad intent, to resist him in its execution. It is claimed on behalf of the defendant that she was so overcome by the opinion of the court, at the time being read, as to render her unconscious of the making of the order for her removal, and unconscious of her subsequent acts in the court-room. Of course, if she was really unconscious of these things, she should not be found guilty under this indictment. But you are to look at this defense as reasonable, sensible men, and in connection with it consider the testimony going to show that, contrary to law, she entered the court-room, with a loaded revolver to hear

a decision announced in a case to which she was a party, and that the decision of the court had not been announced at the time of her interruption of the court, and the making of the order for her removal from the room, although, from what had already been read, what it would be may have become apparent. It is also proper for you to consider in the same connection the declarations referred to in the evidence as having been made by the defendant concerning her conduct on the occasion in question, as also every other fact and circumstance given in evidence. No amount of feeling or exasperation or resentment can be held to justify her acts, or to warrant you in finding a verdict of not guilty, if you are satisfied beyond a reasonable doubt that the order was given to the marshal, and that the defendant was aware of that fact, and that in its execution by the officer the defendant knowingly and wilfully resisted him by any or all of the means stated in the indictment.

Some evidence has been given on behalf of the defendant, tending to show that the order of the court directing the removal of the defendant from the court-room was directed to the clerk of the court, instead of to the marshal. If the court, in making the order, used the word "clerk," and immediately substituted therefor the word "marshal," and the defendant knew that the order was addressed to the marshal, and, so knowing, wilfully resisted him in its execution by any or all of the means set out in the indictment, then and in that case you are instructed that the use of the word "clerk" was a mere slip of the tongue, and was and is unimportant. If, however, the order was addressed to the clerk, and not to the marshal, the defendant cannot be convicted under this indictment.

An officer, in the execution of a valid order, has the legal right to use such force as is necessary to execute it, but no more. Any unnecessary force or violence that may be used in the execution of such order or process is without authority of law; and such excess, if any, may be lawfully met by force or violence sufficient to overcome it.

Where a married woman commits a misdemeanor in the presence of her husband, the presumption of law, nothing to the contrary appearing, is that she acts under the threat, command,

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or coercion of her husband; but, if the circumstances are such as to show that the husband, though in the same room with the defendant, did not exercise any control or coercion, but that the wife was the active, moving party, the presumption arising from the husband's presence will be removed and overcome.

The defendant in this case, like the defendant in every other criminal case, is by the law presumed to be innocent of the crime charged against her. The burden of proving her guilt rests upon the prosecution, and this must be done beyond a reasonable doubt. But by "reasonable doubt" is not meant a mere imaginary or possible doubt, but such a doubt as arises out of the evidence, and is reasonable, in view of all of the facts and circumstances of the case. If, after an impartial comparison and consideration of all the evidence, you can candidly and truthfully say that you are not satisfied of the defendant's guilt, you have a reasonable doubt; but if, after such impartial comparison and consideration of all the evidence, you can truthfully and candidly say that you have a settled conviction of her guilt, such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, you have no reasonable doubt. The facts of the case are for you to determine, and of the credibility of each and every witness you are the sole and exclusive judges. In determining the credibility to be given to witnesses examined, who are to be weighed, not counted, it is your right to take into consideration their interest or feeling in the result of the proceeding, their appearance and deportment while being examined, the probability of the truth of their statements as compared with other testimony given, their opportunities of observation or knowledge of the matters to which they have testified, their friendly or unfriendly feelings towards the respective sides, and how far they may have been contradicted. While a person charged with crime may testify in his own behalf, he is under no obligation to do so, and his failure to testify does not create any presumption against him. You should not, therefore, indulge in any presumption against the defendant for the reason that she did not testify as a witness in her own behalf. You are not to permit your minds to be diverted from the real issue in the case by any argument

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or arguments of counsel, or by any other consideration. So far as the arguments have any legitimate bearing upon the real issue, you should give them the consideration and weight to which you think them fairly entitled. Outside and beyond that, it is your duty to entirely disregard them. If, upon the whole evidence, you are satisfied beyond a reasonable doubt that, at the time and place charged in the indictment, the court made an order directing the marshal to remove the defendant from the court-room, and that the defendant was aware of that fact, and, knowing it, wilfully resisted, obstructed, or opposed the marshal in the execution of such order by any or all of the means set out in the indictment, it is your sworn duty to return a verdict of guilty as charged. Unless you are so satisfied, you should find her not guilty.

SOUTHERN PAC. R. CO. v. TILLEY ET AL.

SAME v. WALKER.

SAME v. PATTERSON ET AL.

CIRCUIT COURT, SOUTHERN DISTRICT OF CALIFORNIA.

MARCH 17, 1890.

1. PUBLIC LANDS — DONATION TO RAILROAD. — 14 Statutes, United States, 292, granted to the Southern Pacific Railroad Company certain land, and provided that, in case any of said land should have been previously disposed of, the company should select other land in certain sections in lieu thereof. The secretary of the interior withdrew such sections, but afterwards allowed a homesteader to enter and obtain patent to a part of one of them. After the patent had issued, the company attempted to select this land, but was not allowed to do so. *Held*, that the company had no right to said land under the grant.

Before ROSS, District Judge.

In equity.

Mr. Joseph D. Redding, for complainant.

Mr. Joseph H. Call, for defendants.

ROSS, J. The land in controversy in this suit having been entered by the defendant, Tilley, as a homestead, and a patent

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therefor having been issued to him by the government, the complainant seeks to obtain a decree that the title thus conveyed is held in trust for it. Prior to the year 1874 the land was unsurveyed public land of the United States. In that year it was surveyed, and a plat of the survey filed in the local land office. The source of the complainant's alleged right is the grant made to it by Congress in the act passed July 27, 1866, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the states of Missouri and Arkansas to the Pacific coast, by the Southern route," by which act the Southern Pacific Railroad Company was authorized to connect with the Atlantic and Pacific Railroad at such point near the boundary line of the state of California as they should deem most suitable for a railroad line to San Francisco, and subject to certain conditions, exceptions, and limitations, was granted every alternate section of public land, not mineral, designated by odd numbers, to the amount of ten alternate sections per mile on each side of such road, to which the United States should have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time such road should be designated by a plat thereof filed in the office of the commissioner of the general land office; and where, prior to said time, any of said sections or parts of sections should be granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, the act provided that other lands should "be selected by said company in lieu thereof, under the direction of the secretary of the interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections, and not including the reserved numbers." (14 U. S. Stats. 295.)

The exceptions contained in the act need not be particularly referred to. The case shows that the Southern Pacific Company accepted the grant, complied with the conditions contained in it, and in subsequent acts upon the subject, and earned the granted lands. All of the land embraced in the primary or twenty-mile limits of the grant vested in the company on the third day of January, 1867, which was the day the map of

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definite location of the road was filed in the office of the commissioner of the general land office. But the land in controversy in this suit was not within those limits. It is a conceded fact that this land is within the indemnity or lieu limits of the grant. With respect to land thus situated, it has been repeatedly decided by the supreme court and by the circuit courts that no title thereto vested in the railroad company prior to its selection. The evidence in the case shows that the complainant never sought to select the land in dispute until November 19, 1887. On that day it embraced it in its indemnity list No. 2, and tendered to the officers of the local land office all proper fees for selecting and listing the land, and securing a patent therefor. The officers of the land department refused to approve the selection; the reason, doubtless, being that the defendant, Tilley, had theretofore been permitted to enter the land as a homestead, upon which entry a patent had been issued. Prior to the homestead entry, however, and prior to Tilley's occupancy of the land, and his claiming it as a homestead, which occupancy and claim, it appears from the evidence, commenced June 28, 1870, the secretary of the interior made an order directing the commissioner of the general land office "to withhold the odd sections within the granted limits of twenty miles on each side of said road, as shown on the map [of definite location, filed January 3, 1867], and also to withdraw the odd sections outside of the twenty miles, and within thirty miles of each side, from which the indemnity for lands disposed of within the granted limits is to be taken. . . ." This order was made March 27, 1867. As will be observed, the order was to "withdraw" the odd sections within the primary limits, and also the odd sections within the indemnity or lieu limits of the grant. "Withdraw" from what? Whether from sale, pre-emption, or homestead entry, or from all of these, does not expressly appear from the order. In *Kansas Pac. Ry. Co. v. Dunmeyer*, 113 U. S. 638, the supreme court said that "in the terminology of the laws concerning the disposition of the public lands of the United States, each of these words has a distinct and well-known meaning." But the intention of the order doubtless was to direct the withdrawal of the lands

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referred to in it from any and every mode of disposition; and such, I think, is its true interpretation. But, notwithstanding the order, the secretary permitted the defendant, Tilley, to enter the particular piece of land in controversy as a homestead, awarded it to him, and caused a patent therefor to be issued to him. The effect of all this is the question for decision, and it seems to me to be of easy solution. Had the complainant sought to select the land in question under its grant prior to Tilley's entry, and the officers of the land department had refused to approve the selection, a very different question would be presented. But here there had been no attempt on complainant's part to select the land at the time of Tilley's entry, or at the time it was awarded and patented to him; and as the land was within the indemnity or lieu limits of the grant, the complainant had then no right of any nature to that particular piece of land. Its grant could only be attached to it by selecting it under the direction of the secretary of the interior. Prior to such selection the land remained public land of the United States. It is true the order of withdrawal made by the secretary on the 27th of March, 1867, had not been in terms vacated, but the secretary had the same power to vacate it that he had to make it; and when he permitted Tilley to make his entry, and awarded the land in question to him, and issued him a patent therefor, he, in effect, annulled the order of withdrawal so far as that particular piece of land was concerned. In doing so, he violated no vested right of the complainant, for to that land the company had not then acquired any right of any nature. It had not selected it, and might never do so. There was, therefore, no legal reason why he should not allow the homestead entry. The act making the grant to the complainant did not direct the secretary of the interior to make any order withdrawing the lands that might fall within it from sale, pre-emption, homestead entry, or other disposition, and did not prescribe the effect to be given to such an order. It is not for the court to say whether the secretary ought or ought not to have allowed the homestead entry while the general order of withdrawal remained unrevoked. It is sufficient for the purposes of this suit to say that in doing so

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he did not interfere with any legal right of complainant, for the simple reason that complainant had not then acquired any right to the land in controversy in the only mode it could acquire it, namely, by selecting it.

This case is altogether unlike that of *Railroad Co. v. Dull*, 10 Sawy. 506. There the land in question was within the primary limits of the grant, the title to which became fixed and perfected in the railroad company as of the date of the grant by the definite location of the line of the road; and the court very properly held that the right thus vested could not be affected by any subsequent settlement or entry.

The views above expressed render it unnecessary to decide whether there was such a possession of the disputed premises by other parties than defendants, at the time of the filing of the map of definite location of the line of complainant's road, as brought the land within the exceptions to the grant contained in the act of July 27, 1866. Two other cases, entitled, respectively, *Southern Pac. R. Co. v. William B. Walker*, No. 95, and *Southern Pac. R. Co. v. J. M. Patterson et al.*, No. 96, were tried, argued, and submitted together with the present one, and as they involve substantially the same question, what has been here said will apply to them also. In each case there must be judgment for defendants, dismissing the bill.

UNITED STATES v. TERRY.

DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA.

MARCH 24, 1890.

1. OBSTRUCTING JUSTICE—EXECUTION OF ORAL ORDER.—Under Revised Statutes, United States, section 5398, which makes it a criminal offense to resist the execution of "any mesne process or warrant, or any rule or order of any court of the United States," resisting a marshal in his execution of an oral order of the court to remove from the court-room a person who has disturbed the proceedings of the court is indictable.

Before Ross, District Judge.

At law.

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Mr. John T. Carey, United States Attorney, and *Mr. Davis Louderback*, Special Assistant United States Attorney.

Mr. Patrick Reddy, *Mr. W. W. Foote*, and *Mr. N. C. Coldwell*, for defendant.

Ross, J. The defendant, by the indictment in this case, is charged with resisting the United States marshal for this district in the execution of an order made by the United States circuit court, in open court, and in the presence of the defendant and of the marshal, directing that officer to remove the defendant from the court-room by reason of her gross misbehavior therein, consisting of loud, boisterous, and insulting language by her addressed to the circuit justice, then presiding in said court, and then engaged in the determination of a cause then pending therein. In his opening statement to the jury, the district attorney stated, what is the undoubted fact, that at the time of the alleged execution of the order, and of its alleged resistance by the defendant, it had not been put in writing, nor had there been any entry of it in the minutes of the court. Being an oral order, it is urged for the defendant that it is not embraced by section 5398 of the Revised Statutes of the United States, upon which the indictment is founded; and therefore that, upon the statement of the district attorney, there can be no conviction under the indictment, and the court should therefore now direct a verdict of not guilty. It is not denied by defendant's counsel that the alleged conduct of the defendant constituted a contempt of the court for which she could have been, and in fact was, legally punished, and that the order for her removal from the court-room was a valid order, which the marshal was bound to execute; but their claim is that the section of the statute upon which the indictment is based does not make the resistance of any oral order a crime. The section reads as follows: "Every person who knowingly and wilfully obstructs, resists, or opposes any officer of the United States, in serving, or attempting to serve or execute, any mesne process or warrant, or any rule or order, of any court of the United States, or any other legal or judicial writ or process, or assaults, beats, or wounds any officer or other per-

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son duly authorized in serving or executing any writ, rule, order, process, or warrant, shall be imprisoned not more than twelve months, and fined not more than three hundred dollars.”

The section is not a new one. It was originally enacted April 1, 1790 (sec. 22, 1 Stats. at Large, 117), and was in existence many years before there was any statute defining contempts. It meant precisely the same thing, when carried into the Revised Statutes, that it meant when enacted in 1790. The first statute defining “contempts” was that of March 2, 1831 (4 U. S. Stats. at Large, 487), which was a restriction upon the power of the courts to punish such offenses, and which provided “that the power of the several courts of the United States to issue attachments, and inflict summary punishments for contempt of court, shall not be construed to extend to any cases except the misbehavior of any person or persons in the presence of the said courts, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of the said courts in their official transactions, and the disobedience or resistance by any officer of the said courts, party, juror, witness, or any other person or persons, to any lawful writ, process, order, rule, decree, or command of the said courts.” By the second section of the act of 1831 it was provided “that if any person or persons shall, corruptly, or by threats or force, endeavor to influence, intimidate, or impede any juror, witness, or officer in any court of the United States in the discharge of his duty, or shall, corruptly, or by threats or force, obstruct or impede, or endeavor to obstruct or impede, the due administration of justice therein, every person or persons so offending shall be liable to prosecution therefor, by indictment, and shall, on conviction thereof, be punished by fine not exceeding five hundred dollars, or by imprisonment not exceeding three months, or both, according to the nature and aggravation of the offense;” thus making the acts therein defined a crime.

The first section of the act of 1831 was carried into the Revised Statutes as section 725, and its second section was therein substantially embodied as section 5399. There are many acts that constitute a contempt of court, and also a crime, under the statute defining crimes. Two cases that recently

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arose at Los Angeles furnish very good examples—*Ex parte Cuddy* and *Ex parte Savin*, both of which are reported in 131 U. S. 280, 267. In *Cuddy's Case*, for an attempt to tamper with a juror, he was cited to show cause why he should not be adjudged guilty of a contempt of court, and upon a hearing of the matter was adjudged guilty of contempt, and sentenced to imprisonment for six months. For precisely the same act he was subsequently indicted by the grand jury under that provision of the statute making it a crime to attempt to tamper with a juror, was tried upon the indictment, and convicted and punished. In *Savin's Case*, for an attempt to intimidate and then to bribe a witness, he was cited to show cause why he should not be adjudged guilty of contempt, and upon a hearing of the matter was adjudged guilty of contempt, and sentenced to imprisonment for one year. For precisely the same act he was subsequently indicted by the grand jury under that provision of the statute making it a crime to attempt to intimidate or bribe a witness, and is yet to be tried upon the indictment. Wherever the statute makes an act that constitutes a contempt also a crime, the fact that the party has been adjudged guilty of contempt, and punished therefor, is no bar to a prosecution under the criminal statute, and is to be considered only in so far as it is just and proper to consider it in imposing punishment for the crime, in the event of a conviction thereof. The sole question, therefore, now for decision, is whether the word "order," found in section 5398 of the Revised Statutes, and originally in the act of 1790, is to be limited to a written order.

Undoubtedly, in judicial proceedings, an "order," as contradistinguished from a "judgment," is often defined as one reduced to writing, and entered in the records of the court; and such is the purport of many of the cases referred to by counsel for the defendant. But that is by no means saying that such only is an order. There must, in the nature of things, be an order of a court made before it is, or can be, written out in the records of the court by the clerk. When written out, the writing becomes a record of the order, and is evidence of it. Orders are almost daily given to the marshal concerning matters to be performed in the presence of the court, and they are as con-

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stantly executed before being written out. Indeed, many of them are never reduced to writing at all. Yet there can be no doubt of their validity. Now, the language of the statute in question is broad enough to include all valid oral orders. The natural, ordinary meaning of the word includes written, as well as unwritten, orders, and there is no reason in the policy of the law, or in the nature of things, for excluding unwritten orders. Indeed, the contrary is true. There is just as much reason and necessity for making it an offense to resist the execution of a lawful unwritten order, brought distinctly and authoritatively to the notice of the offending party, as for making it an offense to resist the execution of one in writing. Take the case where a defendant is alleged to have disturbed the proceedings of the court by loud and insulting language addressed to the presiding justice. Is it not as great an obstruction to the administration of justice; as grave an offense against the public peace; as serious a public injury,—to violently resist the execution of a valid verbal order of the court to remove the offending party from the court-room, made in his presence and hearing, as it would be to resist the execution of the same order after it is written down by the clerk, and a certified copy placed in the hands of the marshal? This question cannot reasonably receive any other than an affirmative answer. Why require written evidence of such valid order of which the party has actual, personal knowledge? In such a case, there is no reason for such requirement, whereas, in the suppositious cases put by counsel, such, for instance, as an attempt to execute a verbal order of which the party affected had not such actual, personal knowledge, reason would be on the other side, and the order to be executed would be required to be in writing. As has been said, the language of the statute, in its ordinary and usual signification, is broad enough to include the order in question, which falls within the mischief intended to be provided against. There is nothing technical in the language of the statute, or in the subject-matter. It is true that other words used in the statute, *ex vi termini*, import a writing, but this was not enough to reach all the mischief intended to be guarded against, and the word “order,” of larger import, was, *ex industria*, introduced.

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A written order delivered to the marshal to execute would be covered by other words found in the section, and there would, therefore, have been no necessity for the use of the word "order." The word "order," in the last clause, has full effect, by referring it to the "mesne process or warrant," before used, and as embracing final, as contradistinguished from mesne process. That the order here in question is embraced by the policy that dictated the enactment of the law does not admit of any doubt, and for the court to exclude from its operation an order, otherwise valid, merely because it was not in writing, would clearly be to import into the statute a limitation not there found, and that, too, against the manifest policy of the law.

The case most relied upon by counsel for defendant in their argument—that of *United States v. Tinklepough*, 3 Blatchf. 426—while arising under the same section of the statute, did not involve the construction of the word "order" at all, nor was the attention of the court in any manner attracted to it. The offense then under investigation was that of resistance to the marshal in the execution of a warrant in writing, and the language of the judge must, of course, be taken with reference to the case before the court. Thus considered, it is clear that that case does not touch the point here involved. A case more like the present one, although not entirely so, is that of *United States v. Lukins*, 3 Wash. C. C. 335. There the defendant was indicted under this same statute for resisting the deputy marshal in executing process issued by the judge, and not by the court. It was contended that as the language of the statute is, "any mesne process," etc., "of the courts of the United States," and the process was not issued by a court, but by a judge, there was no offense under the act. In reply to that contention for such limitation of the statutory language, Justice Washington said: "If this is the right construction of the law, the counsel for this defendant is entitled to all the merit of having made the discovery; for such a construction never before was given or contended for. If such a resistance is not an offense for which a person can be prosecuted, it is better that all the criminal law be struck out from the statute-book, as it is there only to show the debility of the general government. . . . If no protection

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is given by the general government to their officers, it will require no prophet to show what will be the result of such an abandonment of all the rights of the United States. This is not the construction, and strong language would be necessary to show it to be." (*United States v. Lukins*, 3 Wash. C. C. 337, 338.)

After a careful examination of the question, I am satisfied that the order involved in this case is embraced by the section upon which the indictment is founded, and therefore that the point made by counsel, which is, in effect, a motion to direct a verdict of acquittal upon the opening statement of the district attorney, should be, and therefore is, overruled.

STANDARD OIL CO. v. SOUTHERN PAC. CO. ET AL.

CIRCUIT COURT, NORTHERN DISTRICT OF CALIFORNIA.

MARCH 31, 1890.

1. PATENTS FOR INVENTIONS—PATENTABILITY—AGGREGATION—IMPROVEMENT IN OIL CARS.—Letters patent No. 216,506, granted to M. Campbell Brown on June 17, 1879, for an improvement in oil cars, consisting in the division of the car space into two or more compartments, each end compartment containing an oil tank, the partitions between all the compartments being removable, and readily adjustable, are not void as being a mere aggregation of devices, since they obviate the necessity of hauling back empty tank cars, thereby cheapening transportation.
2. IDEM—ACTION FOR INFRINGEMENT—PRACTICE.—Where the question of the validity of a patent is doubtful, a demurrer to a bill for its infringement will be overruled, and the question reserved for further consideration on final hearing.

Before SAWYER, Circuit Judge.

n equity. On demurrer to bill.

This suit was brought by the Standard Oil Company against the Southern Pacific Company and Whittier, Fuller & Co., to restrain the infringement of letters patent No. 216,506, issued to M. Campbell Brown on June 17, 1889, for an improvement in oil cars. In the specification it was said: "My invention relates to cars, and especially to that class of cars designed for transporting merchandise and oil or other liquids; and it consists in

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the parts and combination of parts hereinafter described and claimed, whereby oil or other liquids may be safely transported in the same car with miscellaneous merchandise. The object, as briefly above stated, of my device is to produce an improved form of car for the transportation of oils and liquids in bulk, which shall also be adapted for the transportation of ordinary merchandise on roads where a load of oil or liquid cannot be obtained on return trip, thus obviating the necessity of hauling empty tank cars over long distances, as is now commonly done; and to this end the construction of the ordinary freight car is modified as follows: The car space is divided into two or more compartments, but for the purpose of the present specification, we will suppose it to be divided into three. The central compartment would embrace about two thirds of the entire length of the car, and is designated and adapted for ordinary storage, and for this purpose may be constructed in any proper manner. The two end compartments occupy each about one sixth of the entire length of the car, are located in the ends thereof over the trucks, and are designed and constructed to contain metallic tanks, which tanks are adapted for safely containing and transporting oil or other liquid."

It further appeared from the specification that partitions were provided between the compartments, extending from floor to roof, which were made removable and readily adjustable; that the floor of the central compartment was made level, while that of each end compartment was made slanting so to afford reliable drainage; that the bottoms of the oil-tanks were made inclining, so as to fit on the bottoms of their compartments, and from the lowest point of each was a discharge-pipe; a filling-in opening was provided at the highest point on the top of the tank, which was also made on an incline, and this opening was made to register with an opening in the car top. The claim of the patent was as follows: "A car subdivided into two or more compartments, each end compartment containing an oil-tank, said tank constructed with an inclined or self-draining bottom and resting upon a floor formed in counterpart thereto, said tank also having a tapering or inclined top, with a filling opening placed at or near its highest point and in line with a filling

opening in the car top, and there being a removable partition separating said tank from the next adjacent compartment, all combined substantially as set forth.”

Messrs. Langhorne & Miller, and Messrs. Pillsbury & Blanding,
for complainant.

Mr. Frank Shay, for defendant, Southern Pacific Co.

Mr. John L. Boone, for defendant, Whittier, Fuller & Co.

SAWYER, Circuit Judge (*orally*). I have looked over the question in this case. The main proposition raised on demurrer, is, whether this patent presents a case of a mere aggregation of devices instead of a combination, which would produce some common result. It lies very nearly on the border line under the various rulings of the supreme court. I am not prepared to say, that there is not something more than an aggregation, at all events, upon demurrer. It is true, that the carrying of oil one way does not co-operate, directly, with the performance of carrying merchandise the other way. But do not the two co-operate, directly, in the performance of carrying merchandise both ways? Do not the two co-operate to produce a common result, that is, a reduction of the cost of the transportation of oils by successive acts performed in different parts of the service? The result attained is a carriage at a much less cost. It saves the dead loss of hauling empty cars one way. In many combinations, each single operation, by itself, is not affected by the following, or subsequent operations, but they all constitute one continuous operation and end in a common result. Is not that the nature of this case? One way oils are carried by these compartment cars, arranged, expressly, for the purpose of carrying oil, and, then, on the return voyage, they carry other merchandise, in the intermediate compartments combined with the others, instead of hauling back empty cars. Each carriage, considered by itself, is a separate performance, but what is the result? The result is a much cheaper transportation of the oil. Is not that a common result? And does not each carriage, though performed by itself, co-operate to produce that common result? As I said

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before, it lies very nearly on the border line of these cases, which the supreme court have held to be a mere aggregation. In illustrating that very point, the supreme court in one case said, speaking of the effect of a watch-stem operating, also, as a key to wind the watch, which performed the office of holding and carrying the watch, and also, the office of winding the watch, in distinguishing this from aggregation, the court says: "The office of the stem is to hold the watch, or hang the chain to the watch; the office of the key is to wind it. When the stem is made the key, the joint duty of holding the chain and winding the watch is performed by the same instrument, a double effect is produced, or a double duty performed by the combined result. In these and numerous like cases the parts so co-operate in producing the final effect, sometimes, simultaneously, sometimes, successively. The result comes from the combined effect of the parts, not simply from the separate action of each, and is, therefore, patentable."

Now, here, with these cars, they carry oil one way, and carry merchandise the other way. They are successive operations, but they operate to cheapen the transportation, and, in this sense, does it not come within the illustration of the watch-key? It saves the operation of hauling the empty car one way at an expense without any contributory compensation. I am not prepared to say, at present, on demurrer, that the arrangement does not contribute to the common result of cheapening transportation, and am not prepared to say that the arrangement is not patentable. I shall therefore overrule the demurrer, and reserve the question for further consideration if counsel desire, when the testimony all comes in, and I have the full case before me.

Mr. Boone. Does your honor take into consideration the fact that the result was not new?

The Court. Yes. I do not know but that it is new. If the result is the cheapening of transportation of oils, that result must be new. How can it cheapen, if it does not do something which had not been done before? But, as I said before, I shall reserve it for further consideration. If the same oil could never have been carried before at so low a price the result was, neces-

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sarily, new. I do not know but what the result is new with reference to the transportation of oil.

Mr. Boone. I think the patent itself says no, that it is not new.

The Court. If it cheapens it must do something not done before. A contrary view would involve a contradiction of terms. I shall, at all events, overrule the demurrer. Should counsel desire to further present the question, I will consider it on the further hearing. As I said before, it lies very near the line between an aggregation and invention, as illustrated by the decisions of the supreme court, and it is not very easy to determine on which side it falls.

THE J. D. PETERS.

J. MAZEAS ET AL. v. THE J. D. PETERS ET AL.

DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA.

APRIL 5, 1890.

1. COLLISION — BETWEEN STEAM AND SAIL — EVIDENCE. — A steamer and sloop were approaching nearly end on, the former going ten miles an hour, the latter six. The master and watchman of the steamer testified that the sloop was first seen three miles distant, and one point on their starboard bow, both lights being visible; that the steamer kept her course for two or three minutes, when, the sloop's red light disappearing, they altered their course for a few minutes, when the sloop being about one hundred yards away, changed her course, and came up into the wind, exposing her red light; that the steamer stopped and backed, but was struck on her starboard bow by the sloop's port. The three persons on the sloop denied having changed their course. *Held*, that the steamer had not sustained the burden on her to show that the collision was not her fault.

Before HOFFMAN, District Judge.

Mr. D. T. Sullivan, for libellants.

Messrs. Pillsbury & Blanding, for claimants.

HOFFMAN, J. On the morning of November 17, 1889, a collision occurred between the sloop Solferino of the burden of 19.66 tons and the steamboat J. D. Peters. The course of the sloop was west northwest; that of the steamer east about

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southeast. The vessels were thus approaching each other nearly end on.

Each vessel discovered the other at a distance of two and a half or three miles. The sloop was, as stated by the master of the steamboat, one point on his starboard bow, three miles off.

It is obvious that the collision was caused by gross negligence or mismanagement on the part of one or both of the vessels. In all cases of collision between steamers and sailing vessels, the former are presumptively in fault, for it is the right of the sailing vessel to keep her course, and the "duty of the steamer to adopt such precautions as will avoid her." (*St. John v. Paine*, 10 How. 557; *Steamer Oregon v. Rocca*, 18 How. 572.)

In *Leavitt v. Jewett*, 11 Blatchf. 421, Woodruff, C. J., affirming the decision of Blatchford, D. J., observes: "It was the duty of the steamer to keep out of the way of the sailing vessel which was seen by her, or ought to have been seen by her, at a sufficient distance, and when the room was abundant for any movement the steamer desired to make for the purpose. She did not avoid the schooner. For the collision which ensued she is presumptively responsible. The burden of excusing the collision rests upon her. She has attempted such excuse by imputing to the schooner the change of course, defeating her own measures claimed to have been properly taken. Such change of course is denied by the witnesses from the schooner It is not enough that the steamer has created a doubt upon this sole ground of defense. I am constrained to hold that the defense is not satisfactorily established. In the language of the cases cited from the supreme court, the defense must be *almost conclusively* established."

The account given by the master and the watchman of the steamer is substantially as follows:—

The sloop was first discerned by the steamer one point on her starboard bow and distant three miles. The speed of the steamer was about ten miles per hour; that of the sloop, sailing free, with a strong flood tide in her favor, was about six miles, probably more. The vessels were thus approaching each other at the rate of something more than a mile in four minutes, as they were sailing nearly end on. At first, when

the vessels were about three miles apart, both lights of the sloop were visible. The steamer continued on her course some two or three minutes, when the sloop's red or port light disappeared, leaving only her green light in view. The vessels must then have diminished the distance between them one half or three fourths of a mile, leaving them more than two miles apart. Upon the disappearance of the red light, the steamer altered her course about one half a point to port, exposing her green light to the sloop's green light. The steamer kept on this course or edging more to port "for a few minutes." And "the first thing the captain knew" was that the sloop came right up into the wind exposing her red light. The steamer instantly stopped and backed, but too late to avoid the collision. The sloop struck the steamer's starboard bow with her own port bow a few feet from her stem. When the sloop made this change of course, she was distant from the steamer, according to the watchman, one hundred yards, and according to the captain, two hundred and fifty or three hundred feet. If the sloop had not changed her course, the vessels would, as these witnesses assert, have passed each other, starboard to starboard, at a distance, as the watchman says, of not less than one hundred feet.

With regard to this account of, or excuse for, the collision, which the court is asked to accept as satisfactory, it is to be observed:—

1st. That, by the captain's own showing, the vessels must have been at least a mile apart when the sloop showed her green light. The steamer promptly altered her course to port, thus exposing her own green light. The vessels were thus a mile or more distant from each other, sailing on divergent or at least parallel courses.

If they continued on these courses "some minutes," I find it difficult to understand how, when the sloop came into the wind, she could have been within one hundred yards or two hundred and fifty or three hundred feet of the steamer. Still less how, if she had not come into the wind, the vessels could have passed within one hundred feet of each other.

2d. To enable her to strike the steamer's starboard bow

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with her own port bow, as stated, she must, within one hundred yards, have made a change in her course of, at the very least, eight points, which seems highly improbable, especially as she was running before the wind with her main-sheet free, and would have lost the wind, and been obliged to cross the strong flood tide before getting around far enough to present her port bow to the starboard bow of the steamer.

3d. The maneuver attributed to the sloop was not an ordinary fault of seamanship. It betrays gross incompetency or else bewilderment and total loss of presence of mind. There is no evidence to show that the persons in charge of the sloop were not reasonably competent to navigate their little craft. If they were panic-stricken and lost their heads, it could only have been through fear of a catastrophe they considered imminent. If so, the steamer had no right to expose her to such real or apparent danger. And it is almost inconceivable that they should have entertained such apprehensions, if the vessels had for "some minutes," and for at least a mile, been sailing, starboard to starboard, on divergent or parallel courses.

The nature and extent of the damage sustained by the sloop, and the fact that the steamer was uninjured, seems to show that the sloop was struck by the steamer and not the steamer by the sloop, as asserted by the claimants' witnesses. And further, the fact that far more injury was inflicted than could be caused by the impact of two vessels, one of which by stopping and backing had lost her headway, while the sails of the other were shivering in the wind, lends additional improbability to the account of the accident given by claimants' witnesses.

With regard to the testimony on the part of the libellants, it is enough to say that all of the three persons on board the sloop positively deny having changed her course, or having seen the green light of the steamer until the moment of the collision.

The excuse set up for the steamer in this case is not unfamiliar to the supreme court.

In *Harney v. Baltimore Steam Packet Co.* 23 How. 291, Mr. Justice Grier observes: "But it [the answer] alleges as an excuse that while the steamboat and schooner were meeting on parallel lines the schooner suddenly changed her course and

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ran under the bows of the steamer. This is the stereotyped excuse usually resorted to for the purpose of justifying a careless collision. It is always improbable, and generally false."

In the case at bar it would not be difficult to suggest an explanation of the collision much more probable than that offered by the claimants. But it is unnecessary. It is enough that the claimants are presumptively liable for the accident, and that the burden of proof is on them to show to the satisfaction of the court that the steamer was not in fault. This they have failed to do.

Decree for libellants.

RAWITZER ET AL. v. WYATT ET AL.

CONNOR v. SAME.

CIRCUIT COURT, SOUTHERN DISTRICT OF CALIFORNIA.

APRIL 14, 1890.

1. ANSWER — LIMITED PARTNERSHIP. — The Revised Statutes of New York, chapter 4, title 1, section 7, upon the formation of limited partnerships, requires that an affidavit of one or more general partners shall be filed with the original certificate, stating that the sum therein specified to have been contributed by the special partner was actually and in good faith paid in cash. *Held*, that on a suit to charge a special as a general partner, an answer which, instead of an averment that such sum was paid, alleges that such affidavit was duly filed, is not demurrable, since the affidavit itself, if given in evidence, would be *prima facie* proof of such payment.

Before ROSS, District Judge.

At law. On demurrer to the answer.

Messrs. Rothchild & Ach, and Messrs. Brunson, Wilson & Lamme, for plaintiffs.

Messrs. Dooner & Burdett, for defendants.

ROSS, J. In this case the plaintiffs seek to charge the defendant Newhall as a general partner in the firm of C. A. Wyatt & Co., composed of the defendants, Wyatt and Newhall, and heretofore existing and doing business in the state of New York.

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To the complaint, Newhall has answered, and among other things, sets up that he was a limited partner, only, in the firm, and that prior to the commencement of this action the business of the firm was suspended, and the firm practically dissolved by the absconding of Wyatt; that subsequently, and also prior to the bringing of this suit, defendant Newhall commenced an action against Wyatt in the supreme court of the state of New York, in which action a receiver was duly appointed by the court of all of the property and assets of the firm, which receiver qualified, and took into his possession all of its property and assets, which he still holds; that prior to the going into effect of the copartnership, and to the commencement of business by the firm, the respective partners, under and pursuant to the provisions of the statutes of the state of New York providing for the formation of such limited partnerships, executed, acknowledged, and caused to be recorded and published, the certificate required by the statute; and that at the same time each of the partners filed his affidavit, in due form, setting forth that the amount specified in said certificate as contributed by the special partner was actually paid in in lawful money of the United States.

The point of the demurrer which has been filed to this defense is that the answer should expressly allege that the contribution of the special partner was paid in, in cash, before the certificate was filed. Undoubtedly such payment must have been made before the protection afforded by the statute could attach to the special partner. But the question now is one of pleading, and the answer of the defendant Newhall seems to me to comply with the requirements of the rule as stated in Bates' Law of Limited Partnership at section 199, and in the cases cited by him in support of the text. It was held by the court in the case of *Madison Co. Bank v. Gould*, 5 Hill, 315, that the affidavit being a necessary part of the machinery for forming a limited partnership, it was properly given in evidence, along with the certificate and other papers, for the purpose of showing that the requirements of the statute had been complied with, and that, where the papers are regular and sufficient in form, they make out a *prima facie* case for the defendant that the partnership was a limited one, and throws the burden upon the plaintiff.

Points decided.

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iffs of showing that something was wrong before they could charge the defendant as a general partner. If the affidavit is sufficient proof in the first instance of the fact of payment, it would seem to follow that the allegation of the making of such affidavit is sufficient; for it cannot be that it is necessary to allege a stronger case than it is necessary to prove. The demurred is overruled. A similar order will be entered in the case of *Connor v. Wyatt and Newhall*, which was submitted at the same time as the present case, and in which the same point arises.

THE STEAMSHIP OREGON—JOHN SIMPSON ET AL., LIBEL-
LANTS—THE OREGON SHORT LINE, CLAIMANT.

DISTRICT COURT, DISTRICT OF OREGON.

APRIL 22, 1890.

1. MARINE TORT—LIEN FOR. — A person injured by a vessel on a navigable water of the United States has a lien on such vessel for the damage sustained thereby.
2. ADMINISTRATOR OF PERSON KILLED BY A MARINE TORT. — Under the law of Oregon, an administrator may maintain an action for the death of his intestate, and if caused by marine tort, he has a lien on the offending vessel for such damage.
3. INTERVENTION IN ADMIRALTY. — Under admiralty rule 34, an intervenor may file his libel and then apply to the court for an order requiring the claimant to answer the same, when the claimant may make such defense thereto as in the case of an original libel.
4. TORCH-LIGHT ON SAILING VESSEL. — Section 4234 of the Revised Statutes, requiring sailing vessels to exhibit a torch-light, on the approach of a steam vessel at night, does not apply to foreign vessels in American waters; but good seamanship requires that such sail vessel shall exhibit such light under such circumstances, whether in motion or at anchor, and a failure to do so in case of a collision may constitute contributory negligence on her part.
5. INTERVENTION IN ADMIRALTY. — Any person may intervene in a suit in admiralty *in rem* for his interest; and he may do so, notwithstanding the *res* has been delivered to a claimant on a stipulation in a certain sum to abide and perform the decree, the stipulation, as far as it goes, standing for the United States.
6. SUIT IN ADMIRALTY FOR THE DEATH OF A HUMAN BEING. — Under the statute of Oregon (secs. 371, 3690, Comp. 1887), giving a right of action to an administrator for the death of his intestate, and giving a lien on a vessel navigating the waters of the state for any injury caused thereby, a suit in admiralty may be maintained in the United States district court for such death.
7. DIVISION OF DAMAGES WHERE BOTH VESSELS ARE IN FAULT. — In such case the rule is to deduct the lesser loss from the greater, and require the vessel sustaining the lesser to pay one half of the remainder to the vessel sustaining the greater loss.

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Opinion of the Court—Deady, J.

Before DEADY, District Judge.

Exceptions to the libel of James Laidlaw, administrator of Charles Austin and Matthew Reed, deceased, intervening for his interest in the steamship Oregon, as such administrator.

Mr. C. E. S. Wood, and Mr. Stuart B. Linthicum, for libellants.

Mr. W. W. Cotton, Mr. Zera Snow, and Mr. William B. Gilbert, for claimant.

DEADY, J. Austin and Reed, seamen on the Clan Mackenzie, were killed in a collision that occurred between that vessel and the steamship Oregon, on the Columbia River, on the night of December 26, 1889.

The master of the Mackenzie, John Simpson, has brought suit in this court against the steamship to recover damages for the injury sustained by the collision, alleging that it was caused by the negligence of the persons in charge of the latter, in which suit the administrator has intervened, to which intervention, and the manner thereof, the claimant excepts.

Under the Oregon statute (Comp. 1887, sec. 371), giving a right of action to the administrator for the death of a person, caused by the wrongful act or omission of another, in cases where the deceased, had he lived, might have maintained an action for an injury caused by the same act or omission, an administrator might maintain a suit in admiralty to recover damages for the death of his intestate. (*The Harrisburg*, 119 U. S. 199; *The Alaska*, 130 U. S. 201.)

A person injured by a marine tort—a tort committed on a navigable river of the United States—has a lien upon the offending vessel for the damages he is entitled to recover for such injury. (*The Rock Island Bridge*, 6 Wall. 215; *The Avon*, 1 Brown, 170.)

By the law of the state, the administrator has the same right to maintain an action for the death of his intestate as the latter would have for an injury caused by the same act or omission, if he had lived. It follows, in my judgment, that he has, as an incident of such right, a lien upon the offending vessel for the amount of the damages he may recover in such action.

The administrator has such lien also by virtue of the Oregon statute (Comp. 1887, sec. 3690), which gives a lien on "every boat or vessel used in navigating the waters of this state" for damages or injuries to persons or property by such boat or vessel; for the tort being a maritime one, the state may give a lien in favor of the injured party when it occurs within its jurisdiction. The administrator in this case may intervene in any suit brought against the offending vessel for an injury to person or property caused by the wrongful act or omission that resulted in the death of his intestate, and may join in his libel claims for the death of both Austin and Reed.

Under admiralty rule 34, the administrator may file his libel in the clerk's office, and then apply to the court for an order requiring the claimant to answer the same, and such claimant may thereupon take such exceptions or make such defense thereto as by the course of admiralty proceedings he is entitled to in the case of an original libel.

JANUARY 6, 1891.

DEADY, J. This suit was commenced on December 27, 1889, by the libellant, John Simpson, master of the British ship *Clan Mackenzie*, hereinafter called the C. M., against the steamship *Oregon*, to recover damages resulting from a collision between the two vessels on the Columbia River about forty-two miles below Portland, and alleged to have been caused by the misconduct of the latter.

On the same day the *Oregon* was arrested on process of this court, and a monition to all persons interested therein was duly published.

On January 2, 1890, C. J. Smith filed a claim to the vessel on behalf of the corporation—the Oregon Short Line and Utah Northern Railway Company—hereinafter called the "Short Line," as the charterer of the same for the period of ninety-nine years, from January 1, 1887; and she was then delivered by the marshal to the claimant, on a stipulation to abide and perform the decree of the court, in the sum of \$260,000.

The libellant afterward intervened, and filed a libel herein on behalf of himself and wife to recover damages, alleged to

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have been sustained by them in the loss of their personal effects, by the collision, in which were joined eighteen of the crew of the C. M., each of whom alleged that he had suffered loss of the same kind and by the same means.

Mr. James Laidlaw, British vice-consul at this port, also intervened, as administrator of the estates of Charles Austin and Matthew Reed, and filed a libel herein, alleging that they were of the crew of the C. M. at the time of the collision, and that their deaths were caused by the misconduct of the Oregon on that occasion, and asking damages therefor as provided by the law of Oregon.

James Joseph, another of the crew of the C. M., intervened and filed a libel herein, alleging that he was seriously injured by the collision and asking damages therefor. The libellant, on January 14th, filed an amended libel, and on April 30th, and May 14th, each a supplemental one.

By order of the court under admiralty rule 34, the claimant was required to answer the libels of these intervenors, whereupon exceptions were taken to them, denying the right to intervene after the *res*—the vessel—was discharged from the arrest, which were overruled.

On May 24th, answers were filed to the libels of the intervenors, denying that the alleged injuries and losses were the result of the misconduct of the Oregon, and alleging they were caused by the negligence of the C. M. The answer and amended answer to the principal libel, filed respectively February 3d and May 24th, are to the same effect.

From the evidence, the admissions in the pleadings, the stipulations of the parties, and a view of the vicinity of the collision, I find the material facts of the case to be as follows:—

1. Early in the forenoon of December 26, 1889, the C. M., an iron vessel of 2,500 tons burden, 259 feet in length, 38 feet beam, and 23 feet in the hold, was at Astoria, bound for Portland from Rio Janeiro, in ballast, in tow of the steamboat Oklahoma, in charge of Henry Empken, as master and pilot. About eight o'clock in the evening the C. M. came to anchor on the Oregon side of the Columbia River in five fathoms of water, at three feet flood tide, and about 900 feet distant from,

and a little below a dock and wood-yard for steamboats, called Neer City, and about three-fourths of a mile below Goble's Point, and a mile above Coffin Rock. Immediately below this rock, and a short distance inside of it, on the face of a wooded promontory, a government light is and was then maintained at a height of about thirty feet from the water, with a radiating power of four miles. It is described by the light inspector of the district, Captain William W. Rhoades, as a tubular lens lantern of one-hundred-candle power, and easily visible on a dark, clear night from three to four miles.

2. The Oklahama and the steamship Oregon belonged to the Oregon corporation, the Oregon Railway and Navigation Company, hereinafter called the "Oregon Company," but was at the time in the possession and control of the Short Line, under a lease from the former, and operated by the Union Pacific. The master of the Oklahama anchored the C. M. on the edge of the ship channel, which is there near a half-mile wide at the mean of the lowest low waters, and well out of the usual tract of the ocean steamers that ply between Portland and San Francisco, two of which, he told the master, were coming down the river that night, and also back and out of the range of Coffin-Rock light. He directed the hanging of the anchor light, which was placed accordingly, in the fore-rigging on the starboard side, midway between the foremast and the shrouds, between twenty and twenty-five feet above the deck, and thirty-five and forty feet above the water, and then proceeded with the Oklahama to the dock of the wood-yard, where she was tied up for the night and took on a supply of wood.

3. The C. M. had a white light in a copper lantern, with a globular, corrugated lens over eight inches in diameter, and it was in all respects a sufficient anchor light. The material used in it was equal to the best coal-oil, and it would burn eight hours without trimming. It was easily visible in a dark, clear night, such as this, a mile away, and was kept in place burning brightly from half past ten o'clock up to and at the moment of the collision.

4. On December 26, 1889, the Oregon, an iron steamship of about 2,000 tons burden and 300 feet in length, left Portland

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about nine o'clock in the evening, for San Francisco, with a cargo of freight and passengers, under charge of a pilot, and drawing between sixteen and seventeen feet of water, with a proper mast light and side lights burning. The night was dark and clear, the weather calm, with some clouds in the sky. A few stars were visible. According to the calendar the moon set at 9:42 that evening. Besides the pilot, who was on the center of the bridge just abaft and above the pilot-house, there was a man at the wheel and another forward on the forecastle-head acting as a lookout. The steersman and lookout came on duty at twelve o'clock, and besides these, no person connected with the vessel was on duty on deck from that time to the collision.

5. Near one o'clock, and a mile or more above Goble's Point and opposite the railway ferry landing, the anchor light of the C. M. and Coffin-Rock light might have been seen from the ship's channel in the Columbia River; and there the pilot saw one light, which he took for the latter. From this point the Oregon followed the bend of the river to the westward for nearly a half mile until both lights were shut out by Goble's Point. In the course of the next half a mile she came back to the northward, so that by the time she was abreast of the foot of Sand Island and just above Goble's Point, if she had been in mid-channel, both lights would have been plainly visible from her deck—though somewhat nearly in line—the light of the C. M. being the farther in shore. But the Oregon hugged the shore in the bend above Goble's Point and came abreast of it on the south side of the channel, when the pilot saw a light which he still supposed to be Coffin-Rock light, and "headed" for it, giving the steersman the course, northwest by north, which he held to the moment of the collision, while the general direction of the ship channel from there to below Coffin-Rock light is north northwest. At this time the Oregon was going through the water at the rate of twelve miles an hour and about fifteen miles past the land, or a mile in four minutes. The state of the weather and the condition of the Oregon as to lights, speed, and persons on deck on duty, were and continued the same as above stated, from thence to the moment of the collision. The light which the pilot saw, both above and at and below Goble's Point,

and mistook for the Coffin-Rock light, was in fact the C. M. light. He candidly admits that he never saw but one light until after the collision, and when he came around Goble's Point he "headed" for it, having it a "little" or about a "quarter" of a point on his port bow.

But on this point he is somewhat uncertain and obscure. It is clear from the testimony of the steersman, as well as that of the pilot, that the vessel's course was not changed from the time she was headed off Goble's Point for the light. If he means that he ran three fourths of a mile, starting with the C. M. light a quarter of a point on his port bow, without changing his course, he is certainly mistaken. For in that case, it is demonstrable that the Oregon would have passed the C. M. not less than 150 feet to the starboard of her. On the other hand, if the pilot means that he *held* this light throughout the course, a quarter of a point on his port bow, then he must have starboarded his helm continuously, until the collision, and thus described a parabola, and struck the C. M. at an angle of near forty-five degrees. On the contrary, the course of the Oregon was not changed, and she ran right into the C. M. in a direction slightly diagonal to her keel, striking her between the port cat-head and the stem.

6. When a short distance from the C. M., not to exceed 300 feet, the pilot and the lookout on the Oregon, simultaneously discovered the C. M. The helm was then immediately put a port; but it was too late, and the Oregon crushed into the C. M. as stated.

It is difficult to say from the evidence, which is the testimony of the pilot and lookout, how near the Oregon was to the C. M. when the latter was discerned. Neither of them speak with any certainty as to the time that elapsed between that and the collision, and perhaps they ought not to be expected to. The pilot thinks it may have been a minute and a half from the time he started on the last course to the collision. That point was three fourths of a mile from the C. M. The Oregon was making a quarter of a mile a minute. This would make the distance between the two vessels at the moment of discovery of the C. M. by the Oregon, three eighths of a mile, or 1,980 feet,

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more than three and a half lengths of the Oregon. But the pilot is quite positive that the wheel of the Oregon was put over immediately on discovering the C. M., which is very probable, and that the Oregon was just beginning to answer to her helm when the collision occurred. He also says that under the circumstances, she would not "begin" to answer to her helm until she had moved nearly or about twice her length.

This in my judgment is a very improbable statement. The Oregon was going through the water at not less than twelve miles an hour, with not less than twelve feet of water under her. There was neither wind nor current to impede her motion, and she must have "begun" to answer to her helm as soon as her wheel was put over. From these facts, the conclusion is reasonable that the Oregon was about her length or less from the C. M. when the latter was first seen.

7. It appears from the Commercial Review, published in this city on November 21, 1890, that during the shipping season, between August 6, 1889, and July 26, 1890, fifty-five vessels left this port, foreign-bound, with wheat and flour, and five with salmon, by far the greater number in any one month leaving in December and in November next. And this was a much less number than usual, owing to the light crop east of the Cascades, and the fact that twenty-one vessels were loaded at Tacoma during this season. These sixty vessels, with others, were all towed from Astoria to Portland. Vessels being so towed usually anchor for the night, or a portion of it, in the Columbia River. These facts, which are common knowledge on and about the river, show in a general way that the persons in charge of an ocean steamer going down the Columbia at night ought to be on the lookout for vessels at anchor, so as to avoid collision with them. Indeed the supreme court has said (*N. Y. & V. S. S. Co. v. Cudlerwood*, 19 How. 246), "that neither rain nor the darkness of the night, nor the absence of a light from a barge or sailing vessel, nor the fact that the steamer was well manned and furnished, and conducted with caution, will excuse the steamer from coming in collision with the barge or sailing vessel, where the barge or sailing vessel is at anchor, or sailing in a thoroughfare out of the usual track of the steam vessel."

On these facts, in my judgment, the collision is properly attributable to the misconduct of the Oregon: (a) She should not have been driven through the water at the rate that she was, on such a night, in a river where she was liable to meet other vessels at anchor in the channel or in motion. (b) She should have had more and better lookouts, at least two instead of one, and they should have been on the bow, scanning the horizon and peering into the darkness as far as possible, instead of walking about the forecastle head. (c) She should have had an officer on deck caring for things generally, and particularly to oversee the lookout. (d) Her pilot was negligent or incompetent in mistaking the anchor light of the C. M. for that of Coffin Rock, and in not keeping well out into the channel of the river before rounding Goble's Point, so as to bring the latter light plainly in view before giving the steersman the course, and also in standing continuously at the middle of the bridge, over and above the light in the pilot-house, instead of moving back and forth thereon.

The pilot seeks to excuse himself for not seeing but the one light, that of the C. M., by suggesting that the two lights must have been so near in line with one another and the Oregon, that a mast of the C. M. intercepted the rays of the Coffin-Rock light. Admitting this to be possible, however improbable under the circumstances, still if the pilot had moved back and forth on the bridge, he would have been out of the supposed line, and could have seen, with ordinary powers of vision, the lower light. Besides, if at the distance of three fourths of a mile from the C. M., the Oregon started on her course down the stream with the light of the former about a quarter of a point on her port bow, she would very soon be out and to the starboard of the supposed line with the mast of the C. M. and Coffin-Rock light, and the latter would have come plainly in view.

And it may be admitted that when the pilot was three fourths of a mile from the light of the C. M., and notwithstanding the difference in the distance, size, and radiating power of the two lights, he might, without fault, have mistaken it for the Coffin Rock, still a mile farther away, yet when he got within a quarter

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of a mile of the C. M., he should, in my judgment, have become aware of his mistake, and gone to the starboard, as he could easily have done.

But there were other and significant circumstances to be considered in this connection. The Coffin-Rock light, which the pilot thought he was heading for, was at least one and three fourths of a mile from Goble's Point, and he ought to have known when he had run a half mile from there, and got within a quarter of a mile of the C. M. light, that it was too near for the Coffin-Rock one. Again, the surroundings of the two lights were very different. The ship's light was on or over the water some distance from the shore, which is there comparatively low and receding, while the other is on the face of a comparatively high, wooded promontory. The outline of each shore of the river could be easily distinguished from Goble's Point to Coffin Rock, particularly from the deck of the Oregon.

With all these means of distinguishing these lights, and considering the local knowledge which a pilot on any water is required and undertakes to have, there was no reasonable excuse for mistaking the ship's light for the Coffin-Rock one—especially when within a quarter of a mile of it—unless it be a serious defect of vision or want of local knowledge, either of which amounts to incompetency, for the consequences of which the Oregon is liable.

In *Atlee v. Packet Co.* 21 Wall. 389, 396, Mr. Justice Miller, speaking for the court, said: "The pilot of a river . . . is selected for his personal knowledge of the topography through which he steers his vessel. . . . He must be familiar with the appearance of the shore on each side of the river as he goes along. Its banks, towns, its landings, its houses and trees, and its openings between trees, are all land-marks by which he steers his vessel. The compass is of little use to him. He must know where the navigable channel is, in its relation to all these external objects, *especially in the night.* . . .

"It may be said that this is exacting a very high order of ability in a pilot; but when we consider the value of the lives and property committed to their control, for in this they are absolute masters, the high compensation they receive, and the

care which Congress has taken to secure, by rigid and frequent examinations and renewal of licenses, this very class of skill, we do not think we fix the standard too high.”

How familiar the pilot of the Oregon was with the lights and topography of the Columbia River at night does not distinctly appear. It does appear, however, that he has been engaged as a steamboat pilot on the Wallamet and Columbia rivers for many years; but it is not shown that he was ever engaged in piloting on the Columbia River at night. The master of the Oregon testifies that he had only been engaged as pilot on the ocean steamers about two or three months when the collision occurred.

The conclusion having been reached that the collision was primarily the fault of the Oregon, it is next to be considered whether the C. M., by the negligence of those in charge of her, contributed to the result. For the rule is, that a vessel about to be run down or injured by the action of another without any fault on her part, must, nevertheless, do what she reasonably can, under the circumstances, to prevent the injury. (*The Maria Martin*, 12 Wall. 47; *The Continental*, 14 Wall. 359; *The Sunnyside*, 91 U. S. 213.)

On the part of the claimant it is contended that the C. M. not only omitted to do what she might, and good seamanship required that she should do, but that which, by statute, she was bound to do; that is, to have exhibited a torch-light on the approach of the Oregon and thereby warned the pilot of the danger of collision.

On the C. M. there was a watch, an aged negro seaman. He had instructions from the master to keep a good lookout for the ocean steamer that was expected down the river, to ring the bell if it came on thick or foggy, and if anything happened, to give the mate or himself a call. The light was kept in good condition, the bell was not rung, nor was there any flare-up or torch used, or any material provided therefor.

The watch was examined as a witness on behalf of the libellant before a notary, and subjected to a prolonged and puzzling cross-examination. His testimony as to what took place at and immediately preceding the collision, and what he did thereabout,

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is very incoherent if not contradictory. In my judgment, the witness is not wilfully false. But it is manifest that he was not equal to the emergency, and is unable to give an intelligent and accurate statement of what took place on the occasion.

However, this much is quite certain: he saw the Oregon as she came around Goble's Point and headed for the ship's light, which was about three minutes before the collision. He saw the white light at her mast-head first and the hull afterward, but could not tell until the latter came in view that the vessel was headed directly for the C. M. This occurred probably when the Oregon was about one fourth of a mile away, when he commenced shouting "ship ahoy" with all his might, but was not heard or observed on the Oregon, which came straight on at full speed, and within a minute her bow was driven into that of the C. M. about thirty feet, where she stuck like a wedge in a cleft. The pilot immediately commenced to back the Oregon, when the master, who had come on deck, ordered him to desist, saying that if the Oregon was withdrawn, the C. M. would go down at once, with all on board of her. The people on the C. M. were then transferred in the ship's boats to the Oklahama, and as soon as she could make steam, the latter went to the aid of the Oregon and assisted in pushing the C. M. in shore and down stream until they both grounded, about a quarter of a mile from the place of the collision. The next morning, at high water, the Oregon floated, and was pulled out of the C. M., when the latter dropped to the bottom, with the bow in shore and the forward part of the main deck out of the water, and five feet of water in her cabin. Coffin-Rock light was then visible from her stern.

An attempt was made by the defendant to show that the anchor light on the C. M. was down a short time before the collision. A deserter from the ship was found to testify that he was on deck before the collision, and about five minutes before it happened, saw the watchman taking the light up into the fore-rigging, just after trimming it, and observed that it was burning very brightly.

This testimony is contradicted by admitted or well-established facts, and is also improbable.

The master of the C. M., whom I regard as an altogether credible witness, says he was on deck soon after ten o'clock, when the light, by his direction, was taken down and trimmed, not because it needed it, but to insure a good light until morning. This being so, it is very improbable that the old negro watchman would voluntarily incur the unnecessary labor and trouble of trimming this light again before one o'clock, which involved the carrying of a heavy lantern down to the deck and back again. The watchman says he only trimmed the light once that night, and that was when directed to do so by the master. An apprentice, a room-mate of this witness, testifies to facts which convince me that it was much earlier than one o'clock when he was on deck, and that if he saw the watchman with the lantern in his hand at all, it was between ten and eleven o'clock, when he had trimmed the light as directed by the master. On the whole, I do not credit the statement of this witness, at least as to time.

But admitting it to be true, it neither excuses the Oregon nor puts the C. M. in fault. In effect, it amounts to this: the light on the C. M. was taken down, trimmed, and rehung five minutes before the collision. It was up when the Oregon was at the railway ferry landing, for the pilot saw it. If down after that, it must have been while the Oregon was in the bend of the river, below said landing and above Goble's Point, when the light could not have been seen from her deck if it had been up. When the Oregon came in sight, the light was in place and burning brightly.

The pilot of the Oregon candidly admits that he saw the light of the C. M. first as he passed the railway ferry landing; that as he got into the bend of the river below the landing, the light was shut out by Goble's Point until he rounded the same, when it came in sight again, and he "headed" for it, supposing all the time that it was the Coffin-Rock light.

The watchman on the C. M. was not equal to the emergency. When the Oregon came in sight, and the danger of collision was manifest, instead of simply shouting "ship ahoy," he should have rung the bell. True, his orders did not require him to ring the bell unless it became "thick." But that did not pre-

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vent him from ringing it on the approach of danger. He was not ordered to hail the Oregon either, but he naturally and properly did so; and he had the same right, and was as much bound to ring the bell, or use any other means at hand to attract the attention of the people on Oregon, as to halloo.

The watchman says he thinks his voice could be heard a mile away. But that is largely conjecture, and no particular facts are given to support it. In my judgment the bell could have been heard farther than his voice, and was much more calculated under the circumstances to excite alarm and put the hearer on his guard. It was expected and intended that the ringing of the bell would give timely notice to a vessel approaching the C. M., in a fog, of her existence and whereabouts. And so it might have done in this case. The shrill clang of a ship's bell rung fast and loud is well calculated to attract attention and excite alarm, and thereby put the hearer on his guard.

The omission to show a flare-up or lighted torch is defended or excused by the libellant on the ground that the ship was not bound by law or usage to have or show such a light.

Section 4233 of the Revised Statutes (act of April 29, 1864, 13 Stats. 58), contains twenty-four rules for the lighting and sailing of vessels of the "mercantile marine of the United States." Rule 10 provides: "All vessels, whether steam vessels or sail vessels, when at anchor in roadsteads or fair-ways, shall, between sunset and sunrise, exhibit where it can be seen, but at a height not exceeding twenty feet above the hull, a white light in a globular lantern of eight inches in diameter, and so constructed as to show a clear, uniform, and unbroken light, visible all around the horizon, and at a distance of at least one mile."

By its terms this section is applicable only to American vessels. Yet throughout this case it has been assumed and admitted that it was incumbent on the C. M., while at anchor, as she was, in the edge of the channel of the Columbia River, to exhibit such a light. And this upon theory, I suppose, that the statute is coincident with what is otherwise known in the civilized world as good seamanship or established usage.

But it is objected that the light was hung too high—probably twenty-five feet above the hull of the vessel. But a substantial

compliance with this rule is all that can be expected; and neither the statute nor usage should be construed so as to put a vessel in fault when her light happens to be hung something more than twenty feet above her hull, at least when appears, as in this case, that the colliding vessel was not misled thereby.

Section 4234 of the Revised Statutes provides: "Collectors, or other chief officers of the customs, shall require all sail vessels to be furnished with proper signal lights, and every such vessel shall, on the approach of any steam vessel during the nighttime, show a lighted torch upon that point or quarter to which such steam vessel shall be approaching. Every such vessel that shall be navigated without complying with the provisions of this and the preceding section shall be liable to a penalty of \$200," etc.

This section is compiled from section 70 of the act of February 28, 1871 (16 Stats. 459), passed "to provide for the better security of life on vessels propelled, in whole or in part, by steam, and for other purposes."

Section 1 provides: "That no license, register, or enrollment shall be granted . . . by any collector . . . to any vessel propelled, in whole or in part, by steam, until he shall have satisfactory evidence that all the provisions of this act have been complied with; and if any such vessel shall be navigated without complying with the terms of this act, the owner or owners thereof shall forfeit and pay to the United States the sum of \$500 for each offense," etc.

Section 70 of the same provides: "That it shall be the duty of all collectors . . . to require all sailing vessels to be furnished with proper signal lights, as provided for by the act of April 29, 1864, entitled 'An act fixing certain rules and regulations for preventing collisions on the water;' and every such vessel shall, on the approach of any steamer during the nighttime, show a lighted torch upon that point or quarter to which such steamer shall be approaching. And every such vessel that shall be navigated without complying with the terms of the act of April 29, 1864, and the provisions of this section, shall forfeit and pay the sum of \$200," etc.

By section 41 of the act, all steamers navigating the waters

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of the United States, except public vessels, and vessels of other countries, are made subject to the provisions of the act.

As has been stated, the act of 1864, providing for signal lights, both in the original and the compilation (sec. 4233, Rev. Stats.), is limited in its application to American vessels. The act of 1871 (sec. 41) expressly provides that it shall not be applicable to "vessels of other countries" (*The Hathway*, 25 Fed. Rep. 926), and the whole tenor of the act, particularly sections 1 and 70, show plainly that it was not intended to be applied to any other than American vessels; that is, such vessels as are required to be licensed, enrolled, or registered by the collector of customs. This language could never have been used by Congress in legislation intended to include foreign vessels in American waters.

In the transfer of section 70 to the Revised Statutes, no such purpose is manifested or suggested. The place or company in which it is found furnishes no evidence of such purpose. The preceding section (4233), consisting of twenty-four rules, made professedly to prevent "collisions on the water," applies only to American vessels. This section (4234) is not technically one of these rules, but it is very properly placed immediately after them, is collated with them, and relates to the same subject — the preventing of "collisions on water." But what is more significant and controlling, like the section of the act of 1871 from which it was compiled, it is in effect restrained by its terms to such "sail vessels" as the United States collectors of customs may license, enroll, or register, provided they are furnished with the proper signal lights as required by the preceding section (4233).

From these premises it follows, in my judgment, that section 4234 of the Revised Statutes, requiring a sail vessel to exhibit a torch-light on the approach of a steamer, is not applicable to a foreign vessel in American waters, and therefore was not to the *Clan Mackenzie*.

There is no doubt that the local or municipal law of the United States applies to British vessels in American waters, unless the contrary appears to have been intended by the legislature, and the rights and liabilities of persons and vessels in

case of a collision between such a vessel and another on such waters are to be determined by such law. (*The Scotland*, 105 U. S. 29.)

In this case, however, the act in question, the torch law, appears by a necessary implication to have been intended for domestic vessels only.

Why this regulation should be so limited is not apparent. To prevent "collision" on American waters and provide for the "security of life" thereon, it is as necessary that a foreign sail vessel should exhibit a torch-light on the approach of a steamer, as a domestic one. But the question of what the statute ought to be is for Congress, and not the courts. The latter must administer it as they find it.

This conclusion renders it unnecessary to consider the point made by the libellant, that section 4234 does not apply to a vessel at anchor, because, as was contended on the argument, such a vessel is not, while so at rest, being "navigated," within the meaning of the section.

In *The Lizzie Henderson*, 20 Fed. Rep. 524, it was held otherwise; and I am inclined to agree with the ruling in that case. In my judgment, a vessel is being "navigated," within the purpose of the statute and the ordinary meaning of the term, whether at anchor or not, while she is engaged in a voyage from one port to another.

The claimant also seeks to put the fault of this collision on the C. M., on the ground that she was improperly anchored in the line of the Coffin-Rock light, and the usual course of steamers from off Goble's Point thereto. My own judgment and finding is, that the vessel was properly anchored, both as to the channel and light, and that the Oregon, if properly and safely navigated, would have passed down at least 400 feet to the starboard of her.

But if this were otherwise, I do not think the claimant can be heard to complain of it. It is stipulated in this case that the Union Pacific, by proper arrangements with the owner and lessee thereof, is and was operating both the steamer and the tug—the Oregon and the Oklahama—as well as the Oregon Short Line and the Utah Northern. Through its agent, the

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master and pilot of the *Oklahoma*, Empken, the C. M. was anchored as and where she was, when the collision occurred. And the same may be said of the hanging of the anchor light. Empken directed the hanging of it, and told the watchman to "hang it higher." To do so would be to take advantage of its own wrong.

And lastly, did good seamanship require the C. M. to be prepared with material for a torch-light or flare-up, and exhibit the same on the approach of the *Oregon*, and thus warn her of the danger of the collision?

The testimony of the local pilots and steamboat men is uniformly to the effect that they never saw or heard of the exhibition of a torch-light by a sail vessel on these waters; and they add, that they never knew of any occasion for one being so used. But the experience and observation of a person on the *Columbia* and *Wallamet* rivers is not sufficient to furnish a standard or criterion of what good seamanship demands or includes in this respect.

The first mention of torch-light that I find in the statutes of the United States is in article 8 of the act of 1864 (13 Stats. 59), now rule 11 of section 4233 of the Revised Statutes. It is called therein a "flare-up," and directed to be exhibited on "sailing pilot vessels . . . every fifteen minutes." In section 70 of the act of 1871 (16 Stats. 459), now section 4234 of the Revised Statutes, the term used is "a lighted torch," and sail vessels are required to show it on the approach of a steam vessel in the night-time.

By article 9 of the act of March 1, 1885 (23 Stats. 439), adopting the "Revised International Regulations for preventing collisions at sea," it is provided that "a pilot vessel, when engaged on her station on pilotage duty," shall "exhibit a flare-up light . . . at short intervals," not exceeding fifteen minutes; and in article 11 of the same act (p. 440) it is provided that "a ship which is being *overtaken* by another, shall show from her stern to such last-mentioned ship a white light or flare-up light."

It is but reasonable to suppose that the flare-up or torch-light was in use as a convenient and effective means of preventing

collisions before the same was made obligatory by statute, and the history of navigation and the reports of collision cases show the fact.

Two of the witnesses for the libellant, one a master mariner for twenty years and now the agent of Lloyds in this port, and the other an officer in the United States navy, and now inspector of lights in this district, testify on this point. The first says: "The way I understood my duty as a shipmaster, was to avoid danger by all possible means, and therefore, if a ship was to approach me, and I had reason to believe there was a bad look-out kept, then I would take my flare-up and show it." The latter says: "A flare-up light or a torch or a blue light is supposed to be in readiness at any time in case of an emergency. . . . In bad, thick weather, in case of a vessel lying in the track of steamers, they always keep a flare-up light, ready to burn at a moment's notice, or would on all well-regulated ships."

There is no evidence in the case to the contrary of this. Besides the weight given to it by the character of the witnesses from whom it comes, it commends itself to my judgment on the ground of its reasonableness. Nothing, it seems to me, would sooner or more certainly apprise a misguided steamer, on a dark night, of the existence of a sail vessel in her apparent path, and the danger of collision if persevered in, than a flare-up or torch-light suddenly exhibited over her side.

Had the C. M. been provided with such a light, and had it been exhibited on the first approach of the Oregon, or even when she was within a quarter of a mile of the C. M., it is probable that the collision would not have occurred. At least the C. M. would have done what she ought and could to prevent it, and the Oregon would have been left without excuse.

I find, therefore, that the C. M. was in fault: (1) In not providing her anchor watch with a torch-light or flare-up, whereby her presence might have been indicated to the approaching steamer; and (2) her anchor watch did not avail himself of the means at hand for this purpose, to wit, the ship's bell.

The collision was, therefore, the result of a mutual fault.

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And although the fault of the Oregon, comparatively considered, was more gross and inexcusable than that of the C. M., still the damages resulting from the collision must be divided between them. (*The Catharine v. Dickenson*, 17 How. 170; *Max Morris v. Curry*, 11 Sup. Ct. Rep. 29, and cases there cited.)

The damages claimed on behalf of the C. M. are as follows: Raising ship and anchor, \$20,253; repairs made and estimated, \$24,226.06; equipments lost, \$4,092.70; stores lost, \$2,272.72; miscellaneous, \$3,417.07; special expenses, such as boarding crew on shore, \$1,087.56; demurrage, \$23,625; total \$78,974.11.

The correctness and reasonableness of these charges is not seriously contested, if at all, except that of demurrage and the item of \$1,250, in the miscellaneous charges, paid the agent for furnishing bonds in the suits.

I have not the time, and the length of this opinion already will not permit me, to go into details in passing on these items.

The master of the C. M. says that her average net monthly profits were \$3,000. This for four and one-half months, the time she was detained in this port on account of the collision, amounts to \$13,500. Add to this the difference between the value of the charter lost by the collision and that of the one under which she sailed with 2,500 tons of wheat, which is \$4,219, and we have in my judgment the demurrage to which the libellant is entitled—\$17,719. There must also be deducted from this amount the sum of three per centum thereof, which belongs to the master as part of his compensation, lost by the collision. This is \$531.57, which leaves the amount allowed for demurrage \$17,187.43.

The ship, exclusive of the anchor, was raised by Captain Whitelaw, on a bid of \$19,900 if he succeeded, and nothing if he did not. His was the lowest bid but one, which was for the sum of \$8,000, by a person without experience or means to do the work, and apparently without any proper appreciation of the labor and risk involved in the undertaking. The weather was cold, the river was rising, with ice coming down from the mountains. There was no time to be lost in getting ready or making experiments if the ship was to be saved. Whitelaw

had made wrecking a specialty, had been successful, and had a sufficient plant, including a steamer worth \$60,000, ready to go to work at once. He states that he only made \$4,000, and in ~~my~~ judgment stood an even chance to lose much more.

On the argument, no specific objection was made to this item; but it was claimed formally that the lower bid of \$8,000 should have been accepted. This I am satisfied would have been equivalent to abandoning the vessel. The libellant offered to turn the vessel over to the claimant, but the offer was declined. By stipulation it was allowed to inspect the work of raising the ship as it went on, and does not now specify any objection to the manner or cost of it; and the principal officer of the claimant in this port expressed his satisfaction that Captain White-law had been awarded the contract.

The libellants in the intervention filed April 1, 1890, by the master, John Simpson, his wife, and the crew, for damages for the loss of their personal effects, have testified to and been cross-examined as to their quantity, kind, and value. No evidence has been produced to the contrary, and their statements are probable and reasonable under the circumstances. It is to be remembered that they left England, not many months before, on a long voyage through many latitudes, and would probably be provided with a good stock of winter and summer clothing. By the collision the fore-castle was cut open and their effects lost and destroyed. Besides those which could be enumerated and valued, it is evident there were many memorials, keepsakes, and trinkets which could not be valued or compensated for in money. And although a part of these effects may have shown some use, so that they might have been, in the language of the trade, regarded as second-hand, still they were probably worth to the owners all they cost when new, and they ought to be allowed for them accordingly.

I find that the libellant, John Simpson, suffered damage by the loss of instruments and clothes, \$400, and three per centum on the profits of the ship, \$531.57; total, \$931.57; Mrs. Simpson, by the loss of her own and child's clothing, \$450; and the petty officers and crew from the loss of "personal effects" as follows: George H. Beaumont, first mate, \$1,000; John Farley, second

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mate, \$142; George Ides, third mate, \$312.50; Lochlan McKinnon, carpenter, \$35; James Douglas, steward, \$30; William Simmons, cook, \$80; Joseph Knight, boatswain, \$289; John Bell, seaman, \$177.50; Alex. Fortune, seaman, \$60; Charles Letlow, seaman, \$55.10; James Travers, seaman, \$70; James Wood, seaman, \$100; Elijah Roberts, seaman, \$65; James Sample, seaman, \$92; Edgar Matthieu, seaman, \$106.25; Joseph Horton, seaman, \$109.50; total, \$4,105.42.

The claimant objects to the payment of these claims in this suit, on the ground that the right of the libellants to intervene herein ceased with the delivery of the Oregon by the marshal to the claimant, on the stipulation to abide and perform the decree of the court. The same objection is made in the case of the intervention of the administrator of the estates of Austin and Reed, and of James Joseph.

There is no question but this is a suit *in rem*, and that the libellants have a lien on the vessel for their several claims, and might have intervened in this suit for their interest therein before the release of the same. Does the discharge of the vessel on a stipulation change the character of the suit? Is it no longer a suit *in rem*? and if so, why? In a suit *in rem*, according to the course of the admiralty, the vessel, when arrested, could only be released by order of the court on a stipulation for its appraised value; and this stipulation took the place in the suit of the vessel, and the stipulations therein were liable accordingly.

This stipulation was taken by the marshal under section 941 of the Revised Statutes, which provides that when "process *in rem* is issued in a cause of admiralty jurisdiction," the marshal shall "discharge the property arrested . . . on receiving from the claimant" thereof, "a bond or stipulation in double the amount claimed by the libellant;" and judgment against the stipulators may be given "at the time of rendering the decree in the original cause."

This statute was passed, as is well known, to facilitate the convenient and speedy release of a vessel from arrest in the admiralty; and there is no reason why a discharge of the Oregon under it should be held to have the effect to convert this suit

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in rem, to which all the world are considered parties, and have been warned by the process of this court to intervene for their interest therein, into a proceeding *in personam*, to which no one is or can become a party except the original libellant and the parties in the stipulation.

If the court cannot acquire jurisdiction of the libel of an intervenor unless on the re-arrest of the vessel, on process thereon, the proceeding is in no wise different from an original suit, and the economy and convenience of the proceeding by intervention is practically lost.

In this case the original suit was brought for the value of the vessel, as the C. M. was then supposed to be a total loss, and the stipulation on the release of the Oregon was given for double the alleged value, \$260,000. This amount is more than sufficient to satisfy all the claims against the Oregon, involved in this suit. I see no reason why this statute stipulation should not stand for the *res*, as far as it goes, like the admiralty stipulation for the value thereof. Admiralty rule 34 makes no such distinction, but recognizes the right of any person having an interest in the vessel proceeded against—that is, having at least a lien thereon—to intervene for such interest, without reference to the fact of whether she has been released from arrest or not. Authorities have been cited by counsel for the claimant to the contrary of this, but in my judgment they are not in point—do not bear upon the question. As, for instance, that the owner of a vessel discharged on a statute stipulation in double the amount of the libellant's claim, takes her subject to all other existing liens. This is true, of course, provided such a lien-holder does not elect to intervene in the original suit, and make his claim out of the stipulation instead of the vessel.

The claim of the libellant in the original suit, and those of these libellants, arise out of the same facts, and it is convenient and proper that they should be disposed of in the one suit.

The claim made by Mr. Laidlaw, as administrator of the estates of the deceased seamen, Austin and Reed, is objected to on the ground that the admiralty has no jurisdiction in such a case. In support of this objection counsel cites and relies on

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the cases of *The Harrisburg*, 119 U. S. 199, and *The Alaska*, 130 U. S. 201. What was decided in the first of these cases, and affirmed in the second one, is succinctly stated by Mr. Justice Blatchford in the latter: "In the absence of an act of Congress or of a statute of a state, giving a right of action therefor, a suit in admiralty could not be maintained in the courts of the United States to recover damages for the death of a human being on the high seas, or on waters navigable from the sea, which was caused by negligence."

By a strong implication this is an admission that where either of such statutes does exist, such suit may be maintained. And in *Ex parte McNeil*, 13 Wall. 236, and *Railway Co v. Whitton*, 13 Wall. 270, the court had in effect already so decided. In the former case Mr. Justice Swayne said: "A state law may give a substantial right of such character that where there is no impediment arising from the residence of the parties, the right may be enforced in the proper federal tribunal, whether it be in a court of equity, of admiralty, or of common law." In the latter case, which was an action for damages for the death of a person, upon a statute of the state, Mr. Justice FIELD said: "In all cases where a general right is thus conferred, it can be enforced in any federal court within the state having jurisdiction of the parties."

The statutes of Oregon provide for this case fully and without doubt. Section 371 (Comp. 1887) declares: "When the death of a person is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action at law therefor against the latter, if the former might have maintained an action, had he lived, against the latter, for an injury done by the same act or omission."

The damages must not exceed \$5,000, and the amount recovered is assets in the hands of the administrator.

It is admitted that the right of action conferred by this section on the representative of the deceased is not accompanied by any privilege or lien on the offending thing, if any, and therefore, although it may, as in this case, arise out of a marine tort, it can only be asserted in admiralty, *in personam*. But the statute also gives this privilege or lien. Section 3690

(Comp. 1887) provides: "Every boat or vessel used in navigating the waters of this state, . . . shall be liable and subject to a lien. . . . For all . . . damages or injuries done to persons or property by such boat or vessel."

The Oregon was being used to navigate the waters of this state, and the injury complained of was suffered thereon, and she is clearly within the purview of the statute. A state may give a lien for building a ship (*Edwards v. Elliott*, 21 Wall. 532), or for materials furnished in the home port (*The Lottawanna*, 21 Wall. 558), and such liens may be enforced in admiralty.

It appears that Mr. Laidlaw has been duly appointed administrator of the estate of each of the decedents, by the county court of the proper county, and is therefore entitled to recover in this suit whatever loss the estates of these parties have suffered by their death.

Charles Austin, at the time of his death, was about twenty-five years of age, and in good condition physically and mentally. Matthew Reed was about seventy years, and in the same condition. The expectation of life, according to the testimony of an expert, for the former was forty-two years and for the latter eight years. They appear to have been earning \$15 a month and found. This, if constantly employed, would amount to \$180 a year. But it is not probable that either of them would be so employed during these periods. Deductions must also be made for the cost of clothing and the usual expenses on shore. The damages in this class of cases are for the pecuniary injury only, and nothing is allowed as a *solatium* or solace for wounded feelings or mental sufferings. (*Holmes v. Or. & Cal. Ry. Co.* 6 Sawy. 293.)

In my judgment, the loss to the estates of the deceased does not exceed \$100 a year each. The present value, at eight per centum discount, the legal rate of interest here, of an annuity of \$100 a year for eight years, is \$574, and the same for forty-two years is \$1,200. I therefore find that the libellant is entitled to recover these sums in this suit.

The claim of the libellant, James Joseph, is not otherwise specially objected to. At the time of the collision he was asleep in his bunk on the port side of the forecastle, just above Austin

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and Reed, who were killed. He was caught, in the jam, about his hips and body, and held there until pulled out by the men on deck, which was immediately after the collision. He was in the hospital at Astoria two month. On the 16th of March he was examined by a physician, who testified that he limped on his right leg, that the hip joint was still sensitive and the muscles rigid. He thinks it doubtful if he will ever wholly recover. So far as known no bones were broken nor parts ruptured. His hospital expenses, paid by the vice-consul, amounted to \$88. I find that he is entitled to recover \$1,500 damages.

The libellant and claimant have stipulated that the cost of repairs on the Oregon on account of injuries sustained by the collision is \$8,187.20, and that the time consumed in making such repairs, during which the steamer was laid up, is thirty-two days, for which I allow the claimant damages at the rate of \$200 a day, or \$6,400, making in all the sum of \$14,587.20.

On all these sums, interest will be allowed for one year, at the rate of eight per centum per annum, and in each of the three cases of the libellants intervening for their interests, in addition to the damages already found, there is allowed \$150 as a compensation for counsel in maintaining these suits.

The total damage arising from the collision as now found is \$102,513.49, sustained as follows:—

By the C. M.....	\$72,536 54
By the master and crew.....	4,105 42
By the estate of Austin.....	1,200 00
By the estate of Reed.....	574 00
By James Joseph.....	1,500 00
By the Oregon.....	14,587 20

Total.....	\$94,503 16
Interest on this sum.....	7,560 33

Total.....	\$102,063 49
Add to this counsel fee for the intervenors.....	450 00

Total.....	\$102,513 49
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Where both vessels are found in fault, as in this case, the rule for apportioning the damages is this: each vessel is liable for one half the damage suffered by the other. Where the losses are even, the one offsets the other, but where they are uneven, the half of the difference between the losses is the sum which the one sustaining the lesser loss must pay to the one sustaining the greater. (*The Sapphire*, 18 Wall. 56; *The North Star*, 106 U. S. 18.)

The difference between the loss sustained by the C. M. and the Oregon is \$57,949.34, and the one half of this sum — \$28,974.67 — with interest, amounting to \$31,292.64, must be paid by the Oregon to the C. M., to equalize the loss arising from their mutual fault.

Both vessels having been found in fault, they are equally liable to the intervenors for the whole amount due them — \$8,419.85. Both vessels being before the court, this sum will be divided between them. The one half of it — \$4,209.95 — will be added to the decree against the Oregon, and the other will be paid out of the money made on such decree for the C. M.

No claim is made on behalf of the C. M. that she is not liable, if in fault, for the one half of the damages sustained by the intervenors. The fault of the C. M. in not being provided with a torch-light on the night of the collision was not the fault of a fellow-servant of the intervenors, but that of her owners or their *alter ego*, the master; and as to the latter, the matter is left between him and his employers. (*The Queen*, 40 Fed. Rep. 694.)

A decree will be entered against the Oregon for the sum of \$35,502.59, together with one half of the costs of the case, to be taxed; and unless the same is paid within thirty days therefrom, an execution may issue therefor, against the property of the stipulators.

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ELLINGWOOD v. STANCLIFF.

CIRCUIT COURT, SOUTHERN DISTRICT OF CALIFORNIA.

APRIL 23, 1890.

1. LOCATING PATENT—SURVEYS. — On a question as to the true location of a patent, boundaries fixed by reversing the courses and distances must govern when found to coincide with the natural calls of the patent.
2. IDEM. — When the points fixed by reversing the courses and distances do not coincide with the natural calls of the patent, or the natural calls cannot be identified, then the regular courses and distances must govern.

Before Ross, District Judge.

At law. Action to recover land.

Messrs. Wells, Guthrie & Lee, for plaintiff.*Mr. R. Dunnigan*, for defendant.

Ross, J. (*charging jury*). The documentary evidence in the case shows the title to the land in controversy to have been in the plaintiff at the time of the commencement of this action, if the land is embraced within the boundaries of the rancho Tejunga, as described in the patent for that rancho issued by the government of the United States. The patent was issued October 19, 1874, and the survey embodied in it was made in the year 1858. The survey is therefore an old one, and it will not be surprising if the evidence shows that some or all of the stakes placed by the surveyor who made the government survey have disappeared, or that some or all of the trees called for in the description contained in the patent have been cut down or destroyed. The facts of the case are for you to determine, and of the credibility of each and every witness you are the sole and exclusive judges. There are certain facts, however, about which there is no dispute between the parties. One is that the defendant was, at the time of the commencement of this action, and still is, in possession of that portion of the land sued for which lies between the line claimed by the plaintiff to be the true northerly boundary of the rancho, and which is represented on the plaintiff's maps by the black line, and on the defendant's maps by the red line, and the line claimed by the defendant to be

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the true northerly boundary of the rancho, and which is represented on the plaintiff's maps by the red line, and on the defendant's maps by the black line. So that if you find the true location of the northerly boundary of the rancho to be as claimed by the plaintiff, your verdict should be for the plaintiff; but if you find its true location to be as claimed by the defendant, your verdict should be for the defendant. The real question for determination, therefore, is, what is the correct location of the northerly boundary of the rancho? That there is an error somewhere in the description of the rancho, as embodied in the patent, is a conceded fact in the case. To solve the difficulty, the entire description in the patent must be taken, and the identity of the land thereby conveyed ascertained, by a reasonable construction of the language used, together with the plat of the survey annexed to the patent, and forming a part of it. That plat should be referred to and considered in connection with the notes of the survey, for it forms an important part of the patent. The object in cases of this kind is to ascertain the intent of the parties to the instrument. The rule by which to find the intent is to give most effect to those things about which a mistake is least likely to have occurred. On this principle, the things usually called for in a grant—that is, the things by which the land granted is described—are thus marshaled: *First*. The highest regard is had to natural boundaries. *Secondly*. To lines actually run, and corners actually marked, at the time of the grant. *Thirdly*. If the lines and courses of an adjoining tract are called for, the lines will be extended to them, if they are sufficiently established, and no other departure from the deed is thereby required; marked lines prevailing over those that are not marked. *Fourthly*. To courses and distances, giving preference to the one or the other, according to circumstances. In cases like the present one, where the description is ambiguous and doubtful, parol evidence of the practical construction given by the parties by acts of occupancy, recognition of monuments or boundaries, is admissible, and is to be considered in aid of the interpretation of the instrument. The identity of the natural calls of the patent is for you to determine, and this you must do from all of the evidence in

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the case. If the evidence satisfies you of their true location, and you find that by taking one of the natural calls, as to the correct location of which you are satisfied, and from there reversing the courses and distances given in the patent, the line of the rancho would answer all of the natural calls of the patent back to station 2 of the survey, then, and in that case, I instruct you that such line should be adopted, and the line should be closed by running a straight line from such station 2 to the acknowledged point of beginning of the rancho, which is station 3 of the adjoining rancho ex-Mission San Fernando. In that case, your verdict should be for the plaintiff. If, however, such line so run by the reversed courses and distances would not answer the natural calls of the patent, or if from the evidence you are unable to correctly locate the natural calls, then, and in that case, you are instructed that the courses and distances given in the patent must govern, and in that event your verdict must be for the defendant.

SWEATT v. BURTON.

CIRCUIT COURT, SOUTHERN DISTRICT OF CALIFORNIA.

APRIL 28, 1890.

1. **EJECTMENT — TITLE TO SUSTAIN — STATE CERTIFICATE OF PURCHASE.** — Recovery in ejectment being only on strict legal title, ejectment cannot be maintained on a state certificate of purchase, which is but a contract for a patent on compliance by the purchaser with its terms, though such certificate is made by the state statutes *prima facie* evidence of title.

Before Ross, District Judge.

Ejectment.

Messrs. Wells, Guthrie & Lee, for plaintiff.*Mr. Frank P. Taylor* (*Mr. T. M. McNamara*, of counsel), for defendant.

Ross, J. This is an action of ejectment brought by the plaintiff to recover of the defendant possession of certain land, which was a portion of the land granted to the state of Cali-

fornia as swamp and overflowed land by the act of Congress of September 28, 1850. The plaintiff relies for a recovery upon a certificate of purchase issued by the receiver of the state land office to one Lamberson on the 28th of August, 1884, to whose rights he claims to have succeeded by subsequent assignments and mesne conveyances. It will not be necessary to pass upon the points made and argued by the counsel in the case, for the reason that ejectment cannot be maintained in the federal courts upon a state certificate of purchase, which is but a contract for the sale and conveyance of the land, to be followed by a patent conveying the legal title upon the compliance on the part of the purchaser with the terms of the contract and the full payment of the purchase price. It is true that by section 3514 of the Political Code of California such certificates are made *prima facie* evidence of title, and that by the next succeeding section they, together with all rights acquired thereunder, are made subject to sale by deed or assignment. But it is manifest from the provisions of the California statute upon the subject that, until the issuance of the state patent, the legal title remains in the state, and such is the decision of the supreme court of the state in the case of *Manly v. Howlett*, 55 Cal. 97; and since it is the established doctrine of the supreme court of the United States that in the federal courts a recovery in ejectment can be had alone upon the strict legal title, it follows necessarily that one holding such state certificate only cannot maintain such an action in this court, whatever effect may be given in the state courts to the state statute making such certificates *prima facie* evidence of title. In a late case in the supreme court—that of *Langdon v. Sherwood*, 124 U. S. 74—the court, in speaking of a statute of the state of Nebraska, which declared that the duplicate receipt of the receiver of any land office that the books of his office show the sale of a tract of land to a certain individual “is proof of title, equivalent to a patent, against all but the holder of an actual patent,” said that, “whatever effect may be given to this statute in the courts of the state of Nebraska, it is obvious that in the circuit court of the United States it cannot be received as establishing the legal title in the holder of such certificate.” It is true that the Nebraska case

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was one of a derivation of title from the United States, where the existence of the certificate only implied that the legal title remained in the government. But it is just as plain that in the case at bar the existence of the certificate only implies that the legal title remains in the state; for, according to the provisions of the state statute in respect to the disposal of the swamp and overflowed lands, the certificate, which is but a contract for the sale of the land, and is issued upon the payment of twenty per cent of the purchase money, is to be followed by a patent conveying the title when the purchaser has complied with all of the conditions of the contract, and paid the full amount of the purchase money. "The circuit court," said the supreme court in *Langdon v. Sherwood*, *supra*, "cannot presume that a patent has been issued to the party to whom such certificate was issued, or to any one to whom he may have transferred it. . . . If it never issued, it is obvious that the legal title remains in the United States, and according to the well-settled principles of the action of ejectment, the plaintiff cannot be entitled to recover in the action at law. To receive this evidence, and to give to it the effect of proving a legal title in the holder of such a receipt, because the statute of the state proposes to give to it such an effect, is to violate the principle asserted in *Bagnell v. Broderick*, 13 Peters, 436, that it is for the United States to fix the dignity and character of the evidences of titles which issue from the government. And it is also in violation of the other principle settled by the cited decisions, that in the courts of the United States a recovery in ejectment can be had alone upon the strict legal title, and that the courts of law do not enforce in that manner the equitable title evidenced by these certificates." To the same effect is *Hooper v. Scheimer*, 23 How. 235; *Fenn v. Holme*, 21 How. 482; and *Sheirburn v. Cordova*, 24 How. 425, in which latter case the court said:—

"By a statute of Texas, 'all certificates for head-rights, land scrip, bounty warrants, or any other evidence of right to land recognized by the laws of this government, which have been located or surveyed, shall be deemed and held as sufficient title to authorize the maintenance of actions of ejectment, trespass,

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or any other legal remedy given by law.' (Hart. Dig. Art. 3230.) The testimony adduced by the plaintiff, it would seem, would have authorized a suit in the courts of Texas, where rights, whether legal or equitable, are disposed of in the same suit. But this court has established, after full consideration, that in the courts of the United States suits for the recovery of land can only be maintained upon a legal title. It is not contended in this case that the plaintiff has more than an incipient equity. This question was so fully considered by the court in *Fenn v. Holme*, 21 How. 481, that a further discussion is unnecessary."

In view of these decisions, it seems to me clear that there must be judgment for defendant, regardless of the points made by counsel in the case. It is proper to add that in the case of *Smith v. Mitchell*, 32 Fed. Rep. 680, the point now considered and determined was not brought to the attention of the court. Judgment for defendant.

UNITED STATES *v.* WARD.

CIRCUIT COURT, SOUTHERN DISTRICT OF CALIFORNIA.

MAY 1, 1890.

1. INDIANS—CRIMINAL OFFENSES—HALF-BREED.—The son of a negro father by an Indian mother is not an Indian, within the meaning of the act of Congress of March 3, 1885 (23 Stats. at Large, 385), providing for the punishment of Indians committing certain offenses, as the child follows the condition of the father.

Before Ross, District Judge.

Indictment against Francisco Ward, alleged to be an Indian.

Mr. Willoughby Cole, United States Attorney.

Mr. George J. Dennis, for defendant.

Ross, J. If the defendant is, as is alleged in the indictment, and as is claimed by the district attorney, an Indian, it is clear that he is not embraced by section 5345 of the Revised Statutes; for that section is one of the general laws of the United States

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in relation to crimes committed in places within their exclusive jurisdiction, from which, by virtue of sections 2145 and 2146 of the Revised Statutes, crimes committed in the Indian country, by one Indian against the person or property of another Indian, were excluded. (*Ex parte Crow Dog*, 109 U. S. 567–570.) The first statute of the United States making Indians triable and punishable by the United States courts was the act of March 3, 1885 (23 Stats. at Large, 385), which reads as follows: “That, immediately upon and after the date of the passage of this act, all Indians committing against the person or property of another Indian or other person any of the following crimes, namely, murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny, within any territory of the United States, and either within or without an Indian reservation, shall be subject therefor to the laws of such territory relating to said crimes, and shall be tried therefor in the same courts and in the same manner, and shall be subject to the same penalties, as are all other persons charged with the commission of said crimes, respectively, and the said courts are hereby given jurisdiction in all such cases; and all such Indians committing any of the above crimes against the person or property of another Indian or other person within the boundaries of any state of the United States, and within the limits of any Indian reservation, shall be subject to the same laws, tried in the same courts and in the same manner, and subject to the same penalties, as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States.”

Prior to this act, it had been the policy of the government to permit the Indians preserving their tribal relations to regulate and govern their own internal and social concerns. But by this act Congress made a radical change in the pre-existing policy, and thereby subjected the offenses therein defined to the jurisdiction of the United States tribunals. It is under and by virtue of that act that the indictment in the present case was found, and by which it must be governed. Manifestly, to bring a defendant within the provisions of the act, he must be an Indian; and it was therefore necessary that the indictment should allege the defendant to be an Indian. Such allegation

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being necessary, it is of course essential that the proof should correspond; for it is a cardinal rule in criminal procedure that every material averment of the indictment must be established by proof to justify a conviction. In the present case, it is a fact conceded by the respective counsel that the defendant's father was a full-blooded negro, and his mother a full-blooded Indian; that he was taken by his father, when very young, from the reservation where he was born to reside with the father in Los Angeles City, and he did so reside for a number of years, but has since returned to and lived on the reservation, where the offense in question is alleged to have been committed. And the question now raised is whether the defendant is an Indian, within the meaning of the act of March 3, 1885. If his parentage was a matter about which there was conflicting evidence, or if the fact in relation to it was not conceded, it would have to be passed upon by the jury, along with all the other facts of the case; but, being conceded, it is useless to go into the circumstances of the alleged offense, if it be true, as contended by counsel for defendant, that he is not an Indian, within the meaning of the statute upon which the indictment is founded. The statutes of the United States nowhere define an "Indian." As a matter of fact, the defendant is no more an Indian than he is a negro, and no more a negro than he is an Indian. In the case of *United States v. Sanders*, Hemp. 486, the court held that the quantum of Indian blood in the veins did not determine the condition of the offspring of a union between a white person and an Indian, but further held that the condition of the mother did determine the question; and the court referred to the common law as authority for the position that the condition of the mother fixed the *status* of the offspring. In the subsequent case of *Ex parte Reynolds*, 5 Dill. 403, the court said that the first point decided in the *Sanders Case* was sustained by the common law, as also the last point, if applied to the offspring of a connection between a freeman and a slave. But in *Ex parte Reynolds* the court pointed out that "by the common law this rule is reversed with regard to the offspring of free persons. Their offspring follows the condition of the father, and the rule, *partus sequitur patrem*, pre-

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vails in determining their *status*. (1 Bouv. Inst. p. 198, sec. 502; *Ludlam v. Ludlam*, 31 Barb. 486; 2 Bouv. Law Dict. 147; *Shanks v. Dupont*, 3 Peters, 242.) This is the universal maxim of the common law with regard to freemen—as old as the common law, or even as the Roman civil law, and as well settled as the rule, *partus sequitur ventrem*—the one being a rule fixing the *status* of freemen, the other being a rule defining the ownership of property; the one applicable to different political communities or states, whose citizens are in the enjoyment of the civil rights possessed by people in a state of freedom, the other defining the condition of the offspring which had been tainted by the bondage of the mother. No other rules than the ones above enumerated ever did prevail in this or any other civilized country. In the case of *Ludlam v. Ludlam*, 31 Barb. 486, the court says: ‘The universal maxim of the common law being *partus sequitur patrem*, it is sufficient for the application of this doctrine that the father should be a subject lawfully, and without breach of his allegiance beyond sea, no matter what may be the condition of the mother.’ The law of nations, which becomes, when applicable to an existing condition of affairs in a country, a part of the common law of that country, declares the same rule. Vattel, in his Law of Nations (p. 101), says: ‘As the society cannot exist and perpetuate itself otherwise than by the children of the citizens, these children naturally follow the condition of their fathers, and succeed to their rights. . . . The country of the father is therefore that of the children, and these become true citizens merely by their tacit consent.’ Again, on page 102, Vattel says: ‘By the law of nature alone, children follow the condition of their fathers, and enter into all their rights.’ This law of nature, as far as it has become a part of the common law, in the absence of any positive enactment on the subject, must be the rule in this case.”

It results from these views that the defendant is not an Indian, within the meaning of the statute upon which the indictment is based; and, that being so, the jury must be directed to return a verdict of not guilty upon the conceded fact in regard to the parentage of defendant, without going into the circumstances of the alleged offense.

ANDERSON AND BROOKS v. THE SHIP REUCE.

DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA.

MAY 6, 1890.

1. DAMAGES.—Vessel held liable to seamen for damages caused by scurvy, it appearing that the master failed to serve out to them antiscorbutics as required by law.

Before HOFFMAN, District Judge.

Mr. H. W. Hutton, for libellant.*Mr. T. C. Coogan*, for claimant.

HOFFMAN, J. The claim of the libel in this case is for “wages, for provisions of bad quality, and a failure to furnish antiscorbutics, and for damages for the same cause; also, damages for furnishing improper subsistence, cost of maintenance during sickness, contracted in the service of the vessel, and cost of care ‘under the statutory and general admiralty law.’”

The evidence as to the quantity and quality of the provisions furnished to the men is very voluminous and conflicting. The seamen’s statements with respect to the bad quality of the food are evidently much exaggerated, and I think it unnecessary to decide whether on that account alone they would be entitled to damages. Under the provisions of section 4568 their compensation is limited to a sum not exceeding one dollar a day during the time of the continuance of the supply of food of bad quality.

The substantial cause of action, however, is for damages for pain and suffering caused by scurvy contracted during the voyage. By section 4569 of the Revised Statutes, the master is required to serve out to the crew lime juice and sugar daily at the rate of half an ounce each per day, and the vinegar weekly, at the rate of half a pint per week for each member of the crew.

It is not disputed that the master during a considerable part of the voyage, amounting to about twenty-five days of its entire duration, omitted to serve the lime juice to the crew as required by law. The provisions of the statute in this respect are mandatory, and the captain will be liable to the infliction of a fine if convicted of an omission to comply with his duty in this respect,

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even though the omission should be followed by no ill-consequence to the crew. In this penalty, however, the seamen have no interest. It is imposed by the court after the master is convicted of a statutory offense.

The excuse set up by the master for his failure to furnish the crew with lime juice, as required by law, is that the men preferred to receive coffee instead of the lime juice. The consent of the men to a violation of a positive provision of law can in no respect modify the captain's liability for his offense, nor does it in my opinion affect the seamen's right of recovery, if by reason of the omission their health has been impaired. It may well be doubted whether the captain is not required to compel the crew to take the lime juice, which is recognized as one of the most efficacious antiscorbutics known to science. In the performance of the duty to serve to the men this article, their wishes are not to be consulted. Ignorance and recklessness are the well-known characteristics of seamen, and the surgeon of a ship or hospital might as well consult the wishes of his patients as to their diet and medication, or the father of a family the inclinations of his children with regard to hygienic precautions to preserve their health, as the master of a ship consult or be governed by the wishes of his crew. Had he proposed to substitute grog for the lime juice or coffee, no doubt the proposition would have been gladly and unanimously accepted.

That the libellants were afflicted with scurvy cannot be disputed. Out of a crew of twenty seamen, seventeen were found stricken with scurvy more or less seriously. The legislation of Congress of the United States and Great Britain seems to be founded on the idea that lime juice is a sure preventive of scurvy. This, however, is not acknowledged by any medical authorities. The latest word of science on the subject, so far as I can discover, is that lime juice, though very efficacious, frequently proves inadequate to prevent the appearance of the disease. The surer method is to add to the diet a liberal supply of fresh vegetables, or their juices, preserved in cans. The preservation of meats and vegetables by canning them has grown to be an extensive industry. Canned vegetables are readily procured, and at very reasonable cost. It is possible,

in view of this fact, the courts may feel themselves at liberty to treat the failure to provide the seamen with fresh vegetables, in addition to the lime juice required by law, as a failure to provide them with suitable alimentation to preserve them from the attacks of this formidable disease. It would certainly not be unreasonable that in the laying in of supplies for seamen on long voyages, the master and owners should keep abreast with the progress of science, and the facts ascertained by experience and observation. In providing for the protection of cargoes, as against sweat or other damages to which it may be exposed, this court has held that any system or systems of ventilation found to be efficacious in preventing damages by sweat, which have been generally recognized as such, and usually, if not universally adopted, must be provided by the ship, in order that it may under its contract deliver the goods in like good order and condition as when received. Preventable sweat would in the case supposed cease to be a peril of the sea, because its effects can be obviated by reasonable and proper precautions.

I am unable to see why, when scurvy is found to be a disease preventable, by serving to the men the lime juice which the law requires, supplemented by a diet of fresh vegetables, the ship should not, not merely on grounds of humanity, but in the interest of the owners and the freighters, be required to provide such nutriment, and serve it to the crew. However this may be, it is plain that where the statutory requirement is disregarded entirely, and scurvy makes its appearance among the crew, in the absence of any proof or any reason to suspect that the seeds of the scurvy were contracted by the men on a previous voyage, the ship should be held liable for the damage sustained by reason of the disease.

An interlocutory decree will be entered, declaring the liability of the vessel for the cause of action sued on, and an order of reference to the commissioner will be entered, requiring him to ascertain and report upon the duration and severity of the disease in the case of each seaman; also, whether they were treated in the hospital or by private medication, and in the latter case, whether they had the opportunity to obtain admission to the hospital, and the effect of the disease on the patients, if in any

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instance a permanent loss of health has ensued; and also, a just compensation for the time during which, by reason of the disease, they were incapacitated from working or obtaining a living.

THE UNITED STATES v. THE WALLAMET VALLEY AND CASCADE MOUNTAIN WAGON ROAD COMPANY ET AL.

CIRCUIT COURT, DISTRICT OF OREGON.

MAY 12, 1890.

1. LAND GRANT—WAGON ROADS, COMPLETION OF—STALE CLAIM—ESTOPPEL—BONA FIDE PURCHASER.—In 1866 Congress made a grant of lands to the state of Oregon, to aid in the construction of a wagon road from Albany through the Cascade Mountains to the eastern boundary of the state, and provided that the land might be sold as the work progressed, on the certificate of the governor of the state, that the portion of the same coterminus with said land was "complete." The state transferred the grant without further condition or qualification to the Wallamet Valley and Cascade Mountain Wagon Road Co., which undertook the construction of the road; and, within the five years allowed therefor, procured certificates from the governors of the state that the road was completed as required by law. Soon after the company sold the lands to the defendants, Weill and Cahn, who are now the legal owners thereof, except a small portion which has been disposed of. In 1874 Congress authorized the issue of patents for these lands to the state or its assignee, when it was shown by the certificates of the governor that said road was "constructed and completed." Between 1878 and 1883 a question was made before the department of the interior whether the company had completed the road according to law, and testimony was received thereon, *pro* and *con*, and after argument, the secretary of the interior directed patents to issue to the company, which was done on October 30, 1882, for 440,856 acres, in addition to a patent for 107,898 acres, issued on June 19, 1876. In consequence of this action by the secretary, the defendants believed that the due construction of the road was admitted by the complainant, and was thereby induced to expend a large sum of money on and about said property. In 1889 Congress passed an act requiring the attorney-general to bring a suit in this court against all persons claiming an interest in this grant, to determine the question of construction of the road, the legal effect of the governor's certificates, the right of the United States to resume the grant, and to obtain judgment declaring the land coterminous with any uncompleted portions of the road forfeited, saving the rights of any *bona fide* purchasers; the suit to be tried and adjudicated like other suits in equity. On August 29, 1889, in pursuance of this authority, this suit was commenced to obtain the relief therein specified. The defendants, Weill and Cahn, filed two pleas to the bill, in one of which they set up the foregoing facts as an estoppel, and in the other the defense of a *bona fide* purchaser for a valuable consideration, and without notice of any failure on the part of the company to comply with the terms and conditions of the grant. *Held*, (1) that this suit must be tried as a suit between private persons, in which the defendants may set up any defense, including estoppel and the statute of limitations, that they could if the complainant was merely a private person; (2) that

the claim of the complainant to set aside these patents and declare these lands forfeited is, under these circumstances, a stale one, and therefore ought not to be allowed; (3) that the complainant, by the passage of the act of 1874, either accepted the certificates as conclusive evidence of the due construction of the road, or thereby waived all further performance of the condition on which the grant was made; (4) that the complainant, by the action of its executive department in issuing the patent of 1882, impliedly recognized and accepted the performance of such condition, and, having thereby induced the defendants to change their relation to said property, by expending a large sum of money thereon and thereabout, is now estopped to allege or claim that said condition was not performed; (5) that the certificate of the governor of Oregon was made by the act of 1866 the only evidence of the compliance with the terms of the grant by the completion of the road; (6) that, upon the facts stated in the plea, the defendants are purchasers in good faith and for a valuable consideration, within the saving clause of the act of 1889, and within the general principles of equity jurisprudence; and (7) that, on the case made by the bill and first plea thereto, it appears that the complainant ought not to prevail in this suit, and therefore it is dismissed.

Before DEADY, District Judge.

Mr. Lewis L. McArthur, for complainant.

Mr. John A. Stanley, *Mr. C. E. S. Wood*, and *Mr. Henry Ach*, for defendants.

DEADY, J. By the act of July 5, 1866 (14 Stats. 89), Congress made a grant to the state of Oregon, to aid in the construction of a military wagon road from Albany to the eastern boundary of the state, of the odd sections of the public lands, equal to three sections per mile of said road, to be selected within six miles thereof, together with the right of way for the same. The legislature of the state was authorized to dispose of the lands for the construction of the road as the work progressed, and the governor of the state certified "to the secretary of the interior" that any ten miles of the same was completed. If the road was not completed within five years, no further sales were to be made, and the land remaining unsold should "revert" to the United States. The act also provided that the road should be constructed with such "width, graduation, and bridges, as to permit of its regular use as a wagon road," and in such other "special manner" as the state might prescribe; and that the road should remain a public highway for the use of the government of the United States.

On October 24, 1866, the legislature of the state granted to the Wallamet Valley and Cascade Mountain Wagon Road Company, hereinafter called the "Wagon Road Company," a corporation theretofore formed under the general laws of Oregon for the purpose of constructing and maintaining a wagon road from Albany across the Cascade Mountains, to the Deschutes River, "all lands, right of way, rights, privileges, and immunities" theretofore granted to the state, "for the purpose of aiding said company" in constructing the road described in the act of Congress, "upon the conditions and limitations therein prescribed." (Sess. Laws, 58.)

Between April 11, 1868, and June 24, 1871, both inclusive, there were issued by the governors of Oregon, and duly filed with the secretary of the interior, four certificates, which, taken collectively, showed that the road had been completed, according to the acts of Congress and of the legislative assembly, to the eastern boundary of the state, a distance of 448.7 miles.

On June 18, 1874, Congress passed "an act to authorize the issue of patents for lands granted to the state of Oregon in certain cases" (18 Stats. 80); which reads as follows:—

"Whereas, certain lands have heretofore, by acts of Congress, been granted to the state of Oregon to aid in the construction of certain military wagon roads in said state, and there exists no law providing for the issue of formal patents for said lands, therefore be it enacted, etc., that in all cases where the roads, in aid of the construction of which said lands were granted, *are shown by the certificate of the governor* of the state of Oregon, as in said acts provided, to have been constructed and completed, patents for said lands shall issue in due form to the state of Oregon as fast as the same shall, under said grants, be selected and certified, unless the state of Oregon shall, by public act, have transferred its interests in said lands to any corporation or corporations, in which case the patents shall issue from the general land office to such corporation or corporations upon the payment of the necessary expenses thereof; *provided*, that this shall not be construed to revive any land grant already expired, nor to create any new rights of any kind, except to provide for issuing patents to lands to which the state is already entitled."

On June 19, 1876, and October 30, 1882, two patents were issued to the Wagon Road Company under the act of 1874, the first one for 107,893 acres, and the second one for 440,856 acres, since which no patents have been issued for any portion of the grant.

On June 6, 1881, the secretary of the interior, in a communication addressed to the speaker of the House of Representatives, estimated that the company is entitled under the grant to 1,346 sections of land, or 861,440 acres.

On March 2, 1889, Congress passed an act, making it the duty of the attorney-general to cause a suit to be brought against all persons or corporations claiming an interest in the wagon-road grants made to the state of Oregon, including the one made by the act of 1866, "to determine the questions of the seasonable and proper completion of said roads in accordance with the terms of the granting acts, either in whole or in part; the legal effect of the several certificates of the governors of the state of Oregon of the completion of said roads, and the right of resumption of such granted lands by the United States; and to obtain judgment, which the court is hereby authorized to render, declaring forfeited to the United States all of such lands as are coterminous with the part or parts of either of said wagon roads, which were not constructed in accordance with the requirements of the granting acts; and setting aside patents which have issued for any such lands, saving and preserving the rights of all *bona fide* purchasers of either of said grants, or any portion of said grants, for a valuable consideration, if any such there be. Said suit or suits shall be tried and adjudicated in like manner and by the same principles and rules of jurisprudence as other suits in equity are therein tried.

The act also provides, among other things, for the disposition of the lands, in case the same are declared forfeited by the final determination of said suit.

In pursuance of this act this suit was commenced by the attorney-general on August 29, 1889, on behalf of the United States, against the Wagon Road Company and others, to have the lands included in the said grant forfeited to the United

States, and the patents issued therefor, as well as the certificates of the governors of Oregon, concerning the construction of the road, declared fraudulent and void, on the ground and for the reason, as alleged, that the road never was “constructed and maintained” as required by law, either in whole or in part, so as to be a public highway, over which the property, troops, or mail of the United States could be transported; that the proceeds of said lands were not applied to the construction of the road; that the certificates of the governors are false, and were obtained on the false and fraudulent representations of the Wagon Road Company, without examination on the part of said governors, and in one instance—that of September 8, 1870—with his knowledge that the same was false; all of which was known to the defendants at the time they acquired an interest in these lands.

The bill also shows that by sundry conveyances, commencing with that of the Wagon Road Company of August 19, 1871, to H. K. W. Clarke, and ending with that of Fred W. Clarke, the son of said H. K. W. Clarke, to Alexander Weill, of April 9, 1879, the title to said lands has become vested in the defendants, Alexander Weill and David Cahn; and that T. Edgenton Hogg, and certain corporations of which he is an officer, made defendants in the bill, claim an interest in said lands.

The defendants, Weill and Cahn, by leave of the court, have filed two pleas to the bill, and their joint and several answers in support thereof.

The first plea may be called an estoppel.

Briefly, it alleges that after these defendants had acquired the title to the lands in question as stated in the bill, and in March, 1878, a complaint was received at the office of the secretary of the interior, to the effect that the road had not been constructed as required by the act of July, 1866, in consequence of which the commissioner of the general land office, with the approval of said secretary, appointed a special agent to examine the road and report thereon; that in October, 1880, said agent reported that the road had not been constructed as required by law; that said report, and the evidence accompanying the same, was laid before Congress, and in the House of Representatives was

referred to the committee on military affairs, which committee, upon consideration of said report and evidence, and evidence contradictory thereof, made a report in February, 1881, recommending that no action of Congress be had in the premises.

In their report the committee say, they “do not feel called upon to investigate the disputed question of fraud arising from the *ex parte* testimony submitted, or warranted in expressing an opinion in regard to the same, but believe that to be a matter within the province of the judicial and not the legislative department of the government,” and conclude as follows: “(1) That the act of Congress approved July 5, 1866, vested a present title to the land in question in the state of Oregon. (2) That by the act of the legislature, and the acts of the governor of Oregon, the title to said land was vested in the Wal-lamet Valley and Cascade Mountain Wagon Road Company. (3) That by the deed of said company to Clarke, and the subsequent deeds from Clarke and others, the title of said land is now lawfully vested in the present claimant, Alexander Weill. (4) That said title cannot be forfeited or annulled or re-invested in the United States excepting by a judicial proceeding, and that the same has become a vested right which Congress cannot impair or take away.”

That afterwards, on February 8, 1882, a communication from the secretary of the interior was laid before Congress, containing further charges and alleged proofs that the road was not constructed as required by the act of July 5, 1866, and the matter was referred in the House of Representatives to the committee on public lands, and in the Senate to the committee on military affairs, which committees reported, recommending that Congress take no action in the premises. Both these reports are annexed to the plea and made a part thereof, and each state that the title to this land passed to the state, and it assigns under the act of Congress and the state legislature.

The Senate committee says that “it is impossible” for them “to make such an investigation as will justify action by Congress, which would do justice and equity in the premises;” and that “the executive department of the government had ample authority in law” to investigate the matter, and, if necessary,

to institute legal proceedings in the courts of the United States to secure a forfeiture of the grant, or any part thereof, for failure to comply with the terms and conditions thereof, "without any legislation or instruction from the legislative department."

That, by the proceedings thus had, the matter of the completion of the road was referred to the executive department of the government, whereupon the secretary of the interior, after due investigation of the subject, including the hearing of argument thereon, did, on July 5, 1882, direct the commissioner of the general land office to proceed and certify the lands for patent under the act of June 18, 1874, and thereafter, in October, 1882, said patent for 440,856 acres was duly issued to the Wagon Road Company; that these defendants, relying in good faith upon the action of the legislative and executive department of the government, were induced to, and did, before the passage of the act of 1889, "so alter and change their position in reference to said lands," as to "render it inequitable and unconscionable for the complainant to assert any right . . . to forfeit or reclaim said lands; that these changes consist, in part, in the expenditure of \$2,660.62 in securing the issue of patents therefor; in the payment of \$29,875.79 of taxes levied thereon; in the payment of \$109,800.97 to agents and attorneys for grading, selecting, and platting said lands, and defending the possession of the same from adverse claimants and trespassers; by the sale of sundry parcels of said lands with warranty of title, on which the liability of the defendants exceeds the sum of \$22,609.71; in the expenditure of \$86,805.75 in rebuilding and improving said road, through its entire length, which has greatly increased the value of the lands along the line thereof, a very large portion of which still belongs to the complainant, and in the payment of \$31,651.71 interest on said sums of money, making in all the sum of \$280,754.03.

In the second plea, these defendants aver that they are purchasers in good faith for a valuable consideration, and, in support thereof, allege in substance and effect that in 1871 said lands were in the market for sale, when Weill and H. K. W. Clarke purchased the same of the Wagon Road Company, through their agent, T. Edgenton Hogg; that, in pursuance

of said sale, the vendor conveyed the lands, on August 19, 1871, to said Clarke, who, on September 1st of that year, conveyed the same to the defendant Cahn, in trust for Weill, Clarke, and Hogg; that, at this time, the greater portion of these lands were unsurveyed, and that for the purpose of continuing the existence of the Wagon Road Company, and thereby securing the selection and patenting of the lands, Weill and Clarke, in the month of August, 1871, purchased the stock of said company, and, as a matter of convenience, some of said stock was bought in the name of Hogg, and by him held for Weill and Clarke, but said stock had no value apart from said land grant; that, at the time of the conveyance of said lands by the company, Weill had expended in the purchase thereof \$140,636.39 and Clarke \$20,000; that, at the time of said purchase, the several certificates of the governors of Oregon to the construction and completion of said road, as required by the act of July 5, 1866, were on file in the department of the interior and the office of the secretary of state of Oregon; and these defendants then believed, and do still believe that the same were altogether true, and never heard anything to the contrary until 1880, when the attention of Congress was called to the matter by the secretary of the interior; that, before purchasing the lands, Weill employed counsel learned in the law, who advised him that the title of the Wagon Road Company to the same was perfect, and that he had a right to rely on the certificates of the governors as conclusive evidence that the conditions of the grant had been duly performed; that, in making said purchase, he did so rely, and but for the existence of said certificates would not have made it; that, at the date of the purchase, these defendants were living in San Francisco, and had never been in Oregon, except Cahn, who was there a short time in June, 1867, nor has either of them ever been there since; that, prior to said purchase, neither Hogg nor Clarke had any knowledge or information that these certificates were not true in point of fact, and if they, or either of them, was obtained by false or fraudulent means, neither of these defendants, nor Hogg nor Clarke, had any knowledge or information thereof; that, in 1879, Weill purchased all the interest of Hogg and Clarke in said lands, the

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same being eleven twenty-fourths thereof, for \$21,400, and the release to the former and the estate of the latter, from the repayment to him of their proportions—amounting to many thousands of dollars—of the money advanced by him in the purchase of the lands, and received conveyances from them accordingly, as set forth in complainant's bill.

The answer in support of the plea avers that the price paid by Weill, on August 19, 1871, for the lands, was the full value thereof, and denies all knowledge or notice that the road had not then been duly constructed and completed, as required by the act of Congress, or that the certificates of the governors were in any respect untrue, or had been procured by false or fraudulent representations.

The case was heard on the sufficiency of the pleas, admitting the truth of the facts stated therein.

The act authorizing the bringing of this suit empowers the court to consider and determine these three questions, and no others: (1) Was the road seasonably and properly completed, either in whole or in part, as provided in the act making the grant? (2) What is the legal effect of the governor's certificates concerning the completion of the road? And, (3) What right has the United States to resume the granted lands? (*United States v. Union Pac. Ry. Co.* 98 U. S. 608.)

In the determination of these questions the court is required, by the act of 1889, to proceed "in like manner," and be governed "by the same principles and rules of jurisprudence" as in other suits in equity, that is, as in suits between private individuals. And such is the rule of procedure and adjudication in the case, independent of the directions of the statute.

When the United States comes into a court of equity to assert a claim, it is subject and must submit to the rules of procedure and principles of jurisprudence which obtain in suits between private parties. (*United States v. Arrendondo*, 6 Peters, 711; *United States v. Flint*, 4 Sawy. 58; *United States v. Tichenor*, 8 Sawy. 156.)

The grant of 1866 was a grant *in præsentia*. The language of the act is: "That there be and *hereby is* granted to the state of Oregon." As soon as the line of the road was designated,

the grant attached to the odd-numbered sections, within the prescribed limits, on either side of said line, and took effect from the date thereof. (*Cahn v. Barnes*, 7 Sawy. 53; *Pengra v. Munz*, 12 Sawy. 238; *Schulenberg v. Harriman*, 21 Wall. 44; *Missouri etc. Ry. Co. v. Kansas Pac. Ry. Co.* 97 U. S. 491; *Van Wyck v. Knevals*, 106 U. S. 360.)

The grant, however, was a conditional one, the condition being that the road should be completed, in the manner provided, within five years from the date of the act.

This was a condition subsequent, and, unless it was complied with, the complainant, as grantor, might, by proper legislation or judicial proceedings, have enforced the forfeiture of the grant on the account of such failure. But no one else could do so, and, unless the grantor does, the title remains unimpaired in the grantee. (*Schulenberg v. Harriman*, 21 Wall. 63.)

As appears from the first plea, Congress has repeatedly refused to declare the forfeiture of the grant, or take upon itself the investigation of the question whether the condition had been complied with or not. The attorney-general has declined to institute judicial proceedings to that end, until required to do so by the act of 1889, which appears to have been passed on the memorial of the legislature of the state. It is also well understood that Congress was influenced to the passage of the act by the desire of these defendants to have a speedy and complete determination of their rights in the premises.

On the facts stated in this plea, the demand made by this suit for the forfeiture of this grant, on the ground stated in the bill, is what is known in equity as a stale claim, and therefore ought not to be allowed. The period prescribed for the construction of this road expired in July, 1871, full eighteen years before the commencement of this suit. During all this time it was open to the complainant to bring this suit by its attorney-general, to have this grant declared forfeited on the grounds now stated in its bill. (*United States v. Throckmorton*, 98 U. S. 70; *United States v. San Jacinto Tin Co.* 125 U. S. 278.)

This, in my judgment, is such a delay or lapse of time as renders the claim stale, and constitutes, under the circumstances, a bar to the relief sought.

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Lapse of time, particularly when coupled with possession, as in this case, is a defense in equity in cases not within the reach of the statute of limitations. (Story's Equity Pleading, sec. 813; 2 Story's Equity Jurisprudence, sec. 1520; *United States v. Tichenor*, 8 Sawy. 156; *United States v. Beebee*, 4 McCrary, 12.)

For seven years after the expiration of the time prescribed for the construction of the road and filing of the certificates of the governors, in which its completion was formally and officially declared, nothing appears to have been said or suggested to the contrary by any one, when a trespasser on the lands made a complaint to the secretary of the interior, that the road had not been constructed according to law. Investigation ensued under the direction of the secretary, and the matter was submitted to Congress, who referred it back to the executive department in 1882, where, after due consideration, patents were ordered issued to the company under the act of 1874, which was done as to the greater portion of the lands.

The statute of limitations does not ordinarily run against the United States. But this suit is required by the act of Congress to be tried and adjudicated as a suit between private parties, and therefore, in my judgment, the lapse of time or the bar of the statute of limitations is to have the same effect as in a suit between such parties.

Since 1878, the analogous action at law to recover the possession of these lands on account of a breach of the condition on which they were granted would be barred in ten years, and prior to that time in twenty years. And although the statute of limitations does not apply, *proprio vigore*, to suits in equity, yet, in cases like this, of concurrent jurisdiction at law, the court will apply the same limitation to one as the other. (*Hall v. Russell*, 3 Sawy. 515; *Manning v. Hayden*, 5 Sawy. 379.)

No case has been cited from the supreme court in which it has been distinctly held that the defense of estoppel can be made against the national government. But in many cases it is so assumed, even where the term is not used.

For instance, in *Clarke v. United States*, 95 U. S. 543, it was held that a defense to a claim against the government for the use

of a steamboat, which involved bad faith on its part, could not be made.

In *Branson v. Wirth*, 17 Wall. 39, it is assumed, in the opinion of the court, that the United States may be estopped.

In *United States v. McLaughlin*, 12 Sawy. 200, it was said by Sawyer, "that the law of estoppel in a proper case applies to the government."

In *Indiana v. Milk*, 11 Biss. 209, the court having found that the state by its conduct had recognized the validity of the defendants' title, and thereby induced them to alter their position by investing their money on the strength of it, Judge Gresham said: "The state cannot now in fairness or law assert its invalidity."

"Resolute good faith should characterize the conduct of states in their dealings with individuals, and there is no reason in morals or law that will exempt them from the doctrine of estoppel."

In my judgment, the complainant ought not in fairness and justice be allowed to assert, as against these defendants, that this road was not completed, as required by law, and claim a forfeiture of the grant on that ground.

In the first place, the certificates of the governors to the completion of the road are the acts of the agent of the complainant. By the express terms of the grant, the governor of the state was authorized and required to determine if, and when, the road was constructed, as provided therein; and his certificate to that effect is the necessary and only legal evidence of that fact.

On the faith of these certificates, the truth of which was then and for long after unquestioned, these defendants invested their money in these lands.

By this means the complainant proclaimed to these defendants, this road has been constructed according to law. The condition on which this grant was made has been complied with, and the same has become absolute. And it ought not now to be heard to allege anything to the contrary, even if it should be true, to the prejudice or injury of those who, like these defendants, have in good faith acted upon such representation as true.

In the second place, after the investigations in Congress and the department of the interior, between the years of 1873 and 1882, concerning the effect and verity of these certificates, and the fact of the compliance by the Wagon Road Company with the conditions of the grant, the complainant practically affirmed the right of the company to the lands, and listed the same for patent under the act of 1874, and actually issued such patent, for the greater portion of the grant, on the faith of all which these defendants were induced to materially change their position in relation to the property by expending large sums of money thereon and thereabout, including the payment of \$29,885.79 taxes levied thereon by the authority of the state, and \$86,805.75 disbursed in the repair and improvement of the road.

In addition to the grounds above stated, on which this estoppel ought to be allowed, as against the United States, there is the express provision in the act of 1889, to the effect that this suit shall be tried and adjudicated as a suit in equity between private individuals. This direction is without qualification or exception, and in my judgment, includes the setting up of an estoppel, as well as any other procedure or defense known to equity practice or jurisprudence. By this provision the complainant consents in advance that an estoppel for conduct may be availed of against it in this suit.

And even admitting what is denied by the plea that these certificates are false in fact, and were procured by the fraud of the Wagon Road Company, and that these defendants had notice of the same when they made the purchase, and therefore the complainant is not estopped to show these facts in any litigation between it and them, in which they may be pertinent and material, still, by the deliberate action of the complainant, the inquiry has become immaterial.

Congress had the same right to waive the performance of the condition subsequent to the grant, as to make it in the first place. When, therefore, Congress decided, by the act of 1874, that patents should issue for these lands, in case it was shown by the certificates of the governors of Oregon that the road was "constructed and completed" in effect, it thereby affirmed, for

the purpose of the grant, the integrity and efficacy of said certificates, and accepted them as final and conclusive evidence of the performance of the terms and conditions of the grant, or waived the same. Again, admitting that the complainant could, as a matter of fact, and notwithstanding the certificates to the contrary, show that the road was not completed in all respects according to law, and that these defendants had notice thereof, still, the complainant having subsequently investigated the question upon evidence taken *pro* and *con* thereon, and decided by and through its proper officers, that the grantee, or its assignee, the Wagon Road Company, was entitled to a patent for the lands under the act of 1874, either on the ground that the road had been sufficiently constructed, or that under said act the certificates were conclusive of that fact, in consequence of which these defendants made the expenditures and incurred the liabilities on and about the property as above stated, the complainant would be estopped to show such failure or notice in this suit.

The second plea is also good. All the elements of a *bona fide* purchase appear in the transaction. The original grant passed the legal title to the state which it transferred to the Wagon Road Company, who conveyed the same to these defendants. Their grantor was not only the apparent but the actual owner of the property. The purchase is alleged to have been made in good faith, and nothing appears to the contrary; and it was made for a valuable consideration—\$140,636. It is a matter of common knowledge, of which the court may take notice, that at the date of this purchase the country along the greater portion of the line of this road was unsettled, and much of it occupied by or within the range of wild Indians. Its value was purely speculative. Neither had the purchaser any notice of any defect or flaw in the title of their grantor, or any failure on its part to comply with the condition of the grant.

But on this point the district attorney contends that the grant having been made by statute on a condition subsequent, the purchasers were bound to inquire and see that this condition was fulfilled, before they can claim to have purchased in good faith. Admit this. But how were they to ascertain whether

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the condition was fulfilled or not? In effect, the district attorney answers, by a personal examination of the work on the ground. This would be a very unsafe proceeding. The purchasers might think the work was all that the law required, and some judge or jury, before whom the question might be raised years afterwards, might think otherwise. The only specific direction in the act on the subject is, that the road shall be constructed so as "to permit of its *regular use as a wagon road*, and in such other *special manner* as the state of Oregon may prescribe." The state assigned the grant to the Wagon Road Company without prescribing any "special manner" in which the road should be constructed. It follows that the construction was only to be such as "to permit of its regular use as a wagon road." Nothing could be more indefinite than this. Probably no two men in Oregon could have been found who would agree in all particulars as to what was necessary to constitute such a road.

The act provides for the sale of the lands as the work progresses in sections of not less than ten continuous miles, on the certificate of the governor to the secretary of the interior that the same "are completed." No lands were in fact sold until the certificates were furnished of the completion of the whole road. But this is a matter of which the grantor cannot complain. The provision was intended solely for the benefit of the grantee, and could be waived, as it was.

The power to declare the road, or any portion thereof, not less than ten miles, "completed," was thus vested in the governor. When his certificate to that effect was filed with the secretary of the interior, the fact of completion was established. And any one thereafter seeking to purchase the lands need go no further or seek elsewhere for information on this point.

And so these defendants, finding the evidence on file as to the completion of the road, that authorized the sale of the lands, freed from all conditions thereabout, purchased the same in good faith, and for a valuable consideration.

On the facts stated in the plea there can be but one conclusion in the premises, that these defendants are *bona fide* purchasers within the purview of the act of 1889, and the principles of

equity jurisprudence on that subject. Therefore, they are not liable to have the lands so purchased by them declared forfeited to the United States, even if the certificates of the governors should prove false and fraudulent, of which there is no evidence beyond the formal allegations of the bill, unsupported by any specific statement showing wherein or how they are false or fraudulent.

The pleas are both sustained, and in my judgment the bill ought to be dismissed.

The facts stated in them are not only admitted for the purpose of this hearing, but they are manifestly true. The only exception to this statement is the denial of the falsity of the certificates, or if they are false, notice to these defendants of that fact. That they ever had any such notice is extremely improbable under the circumstances. Naturally enough, a purchaser would rely on the certificates, and not travel hundreds of miles through an unsettled country to determine by personal observation a matter which the law made the governor the unqualified judge of, and which, as I have said, no two persons were likely to agree about.

Admitting that the falsity of the certificates may be shown in conjunction with notice to these defendants of that fact, the time which has elapsed since the period for the construction of the road has expired, and the absence of any resident population along its line at that time would render it extremely difficult to make any satisfactory proof on the subject. The company was not bound to do more than construct the road. Its maintenance was no part of the condition of the grant. If the state had constructed the road, it would, no doubt, have been left to the people, who wanted the use of it, to keep it in repair, as in the case of the other public roads.

The state assigned the grant to the Wagon Road Company without condition in this respect. Nor is it likely that any one would at that day have accepted the grant on the onerous and uncertain condition of keeping the road indefinitely in repair. The fact that the act authorized the land to be sold, freed from all conditions of course, as fast as the road was constructed, shows conclusively that the grant was not intended to be charged with

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the burden of maintaining the road through all time or at all. In the nature of things, in many places the road would soon deteriorate and disappear if not kept in repair. Snow and rain, floods, washouts, and slides must occur yearly on the line of this road, or some portion of it. Therefore, it would be very difficult to show at this late day what was the character and quantity of work done in its construction. The persons employed on the work, who would be the best and almost the only witnesses on this point, are likely in twenty or more years to have died or disappeared.

These alone are probably sufficient reasons for dismissing this bill. But the conclusions reached on the first plea make it certain, in the judgment of this court, that the complainant cannot and ought not to prevail in this suit. *First*, because the claim is clearly a stale one, and also by analogy to the statute of limitations is barred by the lapse of time; *second*, because by the act of 1874 it has either accepted the certificates as conclusive evidence of the due construction of the road, or thereby waived all further performance of the condition subsequent; and *third*, by the action of its executive department prior to 1883, whereby it distinctly recognized and accepted the performance of such condition, and thereby induced these defendants to so alter their position in relation to the property that it would be unconscionable and unjust, now to allege the contrary to their serious injury and prejudice.

As an authority applicable to this case generally, see *United States v. Dalles Military Road Co. ante*, page 387.

Let a decree be entered dismissing the bill as to these defendants.

IN THE MATTER OF JAMES LAIDLAW ON PETITION FOR
THE REMISSION OF A PENALTY.

DISTRICT COURT, DISTRICT OF OREGON.

MAY 13, 1890.

1. **TONNAGE TAX.** — A proceeding before a district judge, to procure a remission of a fine, penalty, or forfeiture, incurred under the customs-revenue law, does not include the case of a tonnage tax, alleged to have been levied in excess of the lawful rate.

Before DEADY, District Judge.

C. E. S. Wood, for petitioner.

Franklin P. Mays, for United States.

DEADY, J. This is a petition by the consignee and agent of British ship *Largo Law*, to have the facts ascertained and submitted to the secretary of the treasury so as to procure a remission or mitigation of a certain tonnage tax, amounting to \$50, imposed on said vessel by the collector of this port. Briefly the case as stated in the petition is this:—

On October, 1889, the *Largo Law* entered the port of San Diego, California, with a cargo from London, consisting partly of cement, of which 3,360 barrels were destined for this port. For the sake of convenience, as it is alleged, the duty on the cargo of the cement was paid at San Diego, from which place the vessel then proceeded to this port with the cement on board. Here, where the collector imposed a tonnage tax on the cargo of fifty cents per ton, under section 4219 of the Revised Statutes, on the ground that she had on board goods—"cement taken on in one district to be delivered in another district," an action of the collector was on November 3, 1889, affirmed by the commissioner of navigation.

Notice of the application was given to the collector and his attorney, the latter of whom appeared and filed a demurrer to the petition.

The petition appears to have been filed under section 5292 of the Revised Statutes. But that section has so far, been superseded by section 17 of the act of June 22, 1874. (18 Stats.

However, in this respect, the sections are substantially the same.

And section 17 provides: "That whenever, for an alleged violation of the customs-revenue laws, any person who shall be convicted with having incurred any *fine, penalty, forfeiture*, present his petition to the judge of the district in which the alleged violation occurred, setting forth truly and particularly the facts and circumstances of the case, and pray for relief, such judge shall, if the case in his judgment

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requires, proceed to inquire, in a summary manner, into the circumstances of the case, at such reasonable time as may be fixed by him for that purpose, of which the district attorney and collector shall be notified by the petitioner, in order that they may attend and show cause why the petition should not be refused."

The case made by the petition is not one for the remission or mitigation of a "fine, penalty, or forfeiture" incurred by the petitioner, or any one else. A fine, penalty, or forfeiture can only be incurred by the doing or omitting of some act contrary to law. The *Largo Law* violated no provision of the customs-revenue laws in coming to Portland with this cement.

It is true that section 4347 of the Revised Statutes forbids the transportation of merchandise from one port of the United States to another, in a vessel belonging in whole or part to a foreigner, under pain of forfeiture. But such section also provides, that merchandise brought from a foreign port in such vessel, and not unladen, may be transported therein from one port to another port of the United States. No forfeiture of this cement could have occurred in this case unless it was unladen at San Diego, and then taken on board again before coming to this port. It is claimed, I understand, that it was constructively unladen by being entered for the payment of duties thereon, and the payment of such duties. But it seems to me that would be a very strained interpretation of the term. So long as the cement remained on board of the vessel, as a matter of fact, it was not, in my judgment, unladen. The general object of the statute is to prevent vessels owned by foreigners from engaging in the coasting trade, and the special exception is that such a vessel may carry its cargo, or any part of it, brought from a foreign port, from one district to another of the United States. However, no forfeiture was claimed in this case, and the petition does not seek relief against any such. Yet if the cement was unladen at San Diego, within the meaning of the statute, the same is liable to forfeiture.

The subject of tonnage tax is regulated by section 4219 of the Revised Statutes. Among other things it provides: "Upon every vessel not of the United States, which shall be entered in

one district from another district, having on board merchandise *taken* in one district to be delivered in another district, duties shall be paid at the rate of fifty cents per ton.” As may be seen, this section only applies to vessels *taking* goods on board in one district to be carried to another, and therefore does not conflict with section 4347, which allows a vessel belonging to a subject of a foreign power to carry so much of its cargo as may have been brought from a foreign port, and not unladen, from one district to another of the United States.

Section 2931 of the Revised Statutes provides that the decision of the collector, as to the rate of tonnage to be paid on the entry of a vessel, shall be final, unless an appeal is taken to the secretary of the treasury in the manner provided, whose decision shall also be final, unless suit is brought to recover such duties. But now by section 3 of the act of July 5, 1884 (23 Stats. 118), creating the bureau and commissioner of navigation, all questions arising under tonnage tax laws are referred to said commissioner, and his decision declared to be final.

Section 2799 of the Revised Statutes provides that “any vessel bringing merchandise into the United States from a foreign port, which is shown to be destined for other districts than the one in which she first arrives, may proceed with the same from district to district, and the duties on such of the merchandise only as shall be landed in any district shall be paid within such district.”

Taking this legislation as a whole, it appears to me that the duties paid at San Diego on the cement destined to Portland were improperly paid, and that the collector should have required the payment of the duties thereon at this port, and that the vessel was not liable to the tonnage tax imposed on it.

Still, as has been said, the case is not one of a fine, penalty, or forfeiture incurred, but of an erroneous imposition of a tonnage tax. For this the statute gives the party a remedy by an appeal to the treasury department, where the case is heard before the commissioner of navigation, subject to the right to bring an action in the courts by the appellant if the decision of the commissioner is adverse to him.

The demurrer is sustained and the petition dismissed.

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BELL v. FOXEN ET AL.

CIRCUIT COURT, SOUTHERN DISTRICT OF CALIFORNIA.

MAY 19, 1890.

1. **EJECTMENT — PLEADING — COSTS AND DAMAGES.** — In ejectment for land of which the several defendants had taken possession, each claiming a certain portion, where some of the defendants enter a disclaimer, and others, with plaintiff's consent, agree to a judgment against them without costs or damages, the remaining defendants, who only plead the general issue, are, on a general verdict against them, liable for all the costs and damages.
2. **IDEM — POSSESSION.** — Ejectment lies against persons who have entered on land, and claim possession adverse to the true owner, though they are not personally in possession at the commencement of the action.

Before Ross, District Judge.

At law. Ejectment.

*Mr. James Wheeler, and Mr. Charles Fernald, for plaintiff.**Mr. Waldo M. York, for defendants.*

Ross, J. There can, I think, be no doubt about the facts of this case. The action is ejectment, and the land in controversy is a part of the rancho La Laguna de San Francisco, which was a Mexican grant, confirmed and patented by the government of the United States. At the trial plaintiff deraigned title to the portion in dispute, which title vested in him long prior to the acts of the defendants complained of. In January of 1889 the defendants entered upon the land, asserting that the patent was obtained by fraud, and that the land was public land of the United States; surveyed and staked it off, each posting a notice that he claimed one hundred and sixty acres thereof, and some erecting shanties and some tents upon their respective claims, and in one or two instances taking possession of small houses that the plaintiff had theretofore erected upon the premises. The case shows that the action of the defendants was in pursuance of a concerted plan on their part to assail the validity of the patent under which the plaintiff holds, and to assert a right in themselves to the possession of the land, and, although they did not long remain in personal, physical possession of the land, they continued to maintain their notices and

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claim to it, and, when remonstrated with by the agent of the plaintiff, continued to assert the invalidity of the patent, and that the land belonged to the government, and that they were therefore entitled to the possession of and claimed one hundred and sixty acres each; and this claim was reiterated to the marshal of this district when serving the process issued in this action. The land in question is a large body of grazing land, and by these acts of the defendants, plaintiff was prevented from renting it for grazing purposes, which he otherwise could have done, its rental value being fifteen hundred dollars per annum. In respect to some of the original defendants, namely, J. M. Birabent, Luis Birabent, William Foxen, and J. W. Oliver, the action has been dismissed; and some of them, to wit, Gustavus A. Davison, John T. Rice, William E. Shanklin, C. H. Mills, F. M. Tunnell, and William B. Holland, have filed written consent to judgment against them, without damages or costs, to which consent plaintiff in writing has acceded. The action has also been dismissed as to the fictitious defendants. The remaining defendants pleaded only the general issue, and, as they were all trespassers upon the plaintiff's land, which was but a single parcel, if each is made liable for all of the damages and costs, it is a necessary consequence of their own conduct.

In *Greer v. Mezes*, 24 How. 277, the supreme court said: "In the action of ejectment, a plaintiff will not be allowed to join in one suit several and distinct parcels, tenements, or tracts of land, in possession of several defendants, each claiming for himself. But he is not bound to bring a separate action against several trespassers on his single, separate, and distinct tenement or parcel of land. As to him, they are all trespassers, and he cannot know how they claim, whether jointly or severally, or, if severally, how much each one claims; nor is it necessary to make such proof in order to support his action. Each defendant has a right to take defense specially for such portion of the land as he claims, and by doing so he necessarily disclaims any title to the residue of the land described in the declaration; and if, on the trial, he succeeds in establishing his title to so much of it as he has taken defense for, and in showing that he was not in possession of any of the remainder dis-

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claimed, he will be entitled to a verdict. He may also demand a separate trial, and that his case be not complicated or impeded by the issues made with the others, or himself made liable for costs unconnected with his separate litigation. If he pleads nothing but the general issue, and is found in possession of any part of the land demanded, he is considered as taking defense for the whole. How can he call on the plaintiff to prove how much he claims, or the jury to find a separate verdict as to his separate holding, when he will neither by his pleading nor evidence signify how much he claims? This was a fact known only to himself, and one with which the plaintiff had no concern, and the jury no knowledge. If a general verdict leaves each one liable for all the costs, it is a necessary consequence of their own conduct, and no one has a right to complain."

I think there was such a possession of the premises by defendants as will justify a judgment in ejectment. The actual personal presence of defendants on the land at the time of the institution of the action is not necessary to its maintenance. Any subjection of the property to the will and dominion of the party is sufficient. (*Mining Co. v. Hicks*, 4 Sawy. 688; *Garner v. Marshall*, 9 Cal. 268.) Acts by which a claim to the possession, hostile to the true owner, is asserted and maintained, and by which he is excluded from the enjoyment of the property, fairly subjects the party committing them to the action. It results from these views that plaintiff is entitled to judgment for the possession of the premises in dispute, as against all of the defendants as to whom the action remains pending, and for damages in the sum of one thousand eight hundred and seventy-five dollars, and costs of suit against all of such defendants except Gustavus A. Davison, John T. Rice, William E. Shanklin, C. H. Mills, F. M. Tunnell, and William B. Holland. So ordered.

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KAHN v. WEILL.

CIRCUIT COURT, SOUTHERN DISTRICT OF CALIFORNIA.

MAY 19, 1890.

1. **MORTGAGES—DEED ABSOLUTE IN FORM—EVIDENCE.**—In a suit to declare a deed absolute on its face a mortgage, and to redeem therefrom, it appeared that O., who was complainant's mother-in-law, was indebted to defendant and to complainant; that she executed to defendant an absolute deed to all her land, which was not at the time worth more than the debt, and received from him all evidences of debt. This deed complainant claimed to have been intended as a mortgage, under an agreement by which he was to have the right to redeem the land thereby conveyed on his subsequent payment of all the indebtedness. O. testified that the deed was intended as an absolute conveyance, and letters from her to defendant and to complainant tended to show that this was the understanding. There were letters from complainant to defendant and to O. running through several years, during which he made no claim that the deed was a mortgage, which went to show that he regarded it as absolute. His testimony was contradictory and improbable. Defendant, and other members of his firm, testified that the deed was absolute. *Held*, that the deed was an absolute conveyance.

Before Ross, District Judge.

In equity.

Mr. Jarrett T. Richards, Mr. George Pearce, and Messrs. Rodgers & Munday, for complainant.

Messrs. Stanly, Stoney & Hayes, for defendant.

ROSS, J. This is a suit in equity in which the complainant, by his bill, seeks to obtain a decree that a certain deed, of date February 24, 1881, absolute in form, and executed by one Augustias de la Guerra de Ord and complainant, and purporting to convey to the defendant five certain parcels of land situated in the county of Santa Barbara, and referred to, for convenience of reference, as the "State-Street Lot," the "Cold-Springs Tract," the "Ord Garden," the "Montecito Tract," and the "Todos Santos Rancho Property," consisting of an undivided interest in the Todos Santos Rancho, was in fact a mortgage, and that the defendant be permitted to redeem all of the said property. In respect to the alleged rights of the complainant, no distinction is made in the bill, which is sworn to by complainant, between the different parcels of land. Precisely the same rights are therein asserted to each. It is, among

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other things, in substance, alleged that, on the 24th of June, 1876, Augustias de la Guerra de Ord was the owner in fee and in possession of the said five parcels of land, and that there was then existing thereon a mortgage executed by her to the defendant, as trustee for the firm of Lazard Freres, to secure an indebtedness from her to that firm, then amounting to \$11,000; that on the day mentioned Mrs. Ord paid \$4,984.65 of the said indebtedness, and the Todos Santos Rancho was thereupon released from the mortgage; that Mrs. Ord was at the same time indebted to the complainant, who was her son-in-law, in a large amount of money which she was desirous of paying, and he of receiving, but, being unable to do so without further encumbering her said property, and being also desirous of aiding and advancing complainant in business, on the thirtieth day of May, 1877, she made and delivered to complainant this power of attorney:—

“Whereas, I, Augustias de la Guerra de Ord, am indebted to Moise Kahn in a certain sum of money, and whereas I am desirous that said Kahn have the management, control, and disposition of my hereinafter-mentioned property, for the purpose of satisfying the above debt due by me to him, now I, Augustias de la Guerra de Ord, in consideration of the above, and that said M. Kahn do accept the trust, do hereby constitute the said M. Kahn my true and lawful attorney for me, and in my name, place, and stead, to manage and control, collect the rents, issues, and profits thereof, by suit or otherwise, and receive the same, mortgage, borrow money, bond, lease, sell, or in any way dispose of all or any part of the following described premises, or any interest therein, as to him may seem best, to wit: All my right, title, and interest in and to all the certain tract of land or rancho situated in the county of Santa Barbara, state of California, called and known as the ‘Todos Santos y San Antonio Rancho,’ confirmed and patented by the government of the United States to the widow, heirs, and executors of William E. B. Hartnell, deceased, by decree of confirmation and letters patent dated November 20, 1876, and recorded in the office of the county recorder of Santa Barbara County, in Book A of Patents, pages 305 and 315 inclusive, which letters patent are

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made part hereof for purposes of description; and in my name and stead, for the above purposes, to make, execute in writing, and deliver any and all mortgages, notes, releases, and all other necessary instruments and documents, and to collect, sue for, and receive all sums of money due from any one from the management and disposition of said property.

“Witness my hand and seal, this thirtieth day of May, one thousand eight hundred and seventy-seven.

“AUGUSTIAS DE LA G. DE ORD.” [SEAL.]

The bill alleges that the complainant accepted the power, and undertook the service; that he called upon the defendant, who was at the time a member of the firm of Lazard Freres, which firm was then engaged in the business of banking and loaning money in the city of San Francisco, and with the members of which complainant then was and had long been on intimate, friendly, and social relations; that defendant was willing to make the desired loan upon the execution by Mrs. Ord of a deed for the Todos Santos Rancho property as security for such loan, which defendant preferred, and advised complainant to procure, and which complainant did procure to be made, and upon the execution of complainant's note as “further security”; that the loan was accordingly made, and secured by the deed from Mrs. Ord and the note of complainant; and that, by the direction of Mrs. Ord, defendant, who, throughout all of the transactions, acted for and in behalf of Lazard Freres, on the 6th of August, 1877, executed to complainant in writing this defeasance:—

“I hold the promissory note of Mrs. Augustias de la G. de Ord, of Santa Barbara, state of California, dated the sixteenth day of March, A. D. 1876, for \$11,000, on which there is due me, principal and interest, \$6,240 92-100. I also hold the note of M. Kahn, for \$5,000, dated August 6, 1877. And the said Ord having conveyed to me, by deed dated July 9, 1877, all her interest in the tract of land situated in the county of Santa Barbara, and known as the ‘rancho Todos Santos y San Antonio,’ which deed is upon its face for the consideration of \$5,000, and is absolute in form, now, therefore, this is to cer-

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tify and make known that said deed, though absolute in its terms, is, in point of fact, given to secure, *first*, the payment of the said note of M. Kahn for \$5,000, with interest that may accrue due thereon; and, *second*, to further secure the principal and interest due me on said note of Mrs. Ord, hereinbefore first above mentioned; but I agree not to subject the lands of the said rancho Todos Santos y San Antonio to the payment of the said note of Mrs. Ord until I have first exhausted the securities I already hold therefor, and then only for any deficiency that may exist after my present securities are exhausted. And I agree that, upon the payment to me by the said Kahn of his said note, with interest, as in said note provided, and also upon the payment of the said note of Mrs. Ord, with interest, and the further payment to me of all sums of money by me for any purpose expended for the protection of said land, or for further or more effectually securing to me the interest in said lands mentioned in said deed, and all expenses and charges that I may incur or make in looking after and protecting or improving said property, and costs and attorneys' charges in enforcing the payment of said money secured by said deed, I will convey the interests so conveyed to me by said deed of the ninth day of July, 1877, to M. Kahn, pursuant to the written request of said Ord, as expressed in her letter to me of July 9, 1877.

“Witness my hand and seal, this fourteenth day of November, A. D. 1877.

A. WEILL. [SEAL.]

“N. B. Before execution, the words ‘of even date herewith,’ in line 8, on page 1, were erased, and the words ‘dated August 6, 1877,’ interlined.”

The bill then alleges that, about the month of January, 1881, Mrs. Ord being still indebted to Lazard Freres, and being still unable to pay complainant the amount due him, and her indebtedness to Lazard Freres being then about to become barred by the statute of limitations of California, the said Lazard Freres moved and induced complainant to, and he did procure Mrs. Ord to sell all of her said property, together with her equity of redemption therein, to complainant, with the understanding and agreement that complainant should and would assume the pay-

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ment of the entire indebtedness of Mrs. Ord to Lazard Freres, and join her in the conveyance and transfer of the whole of the said real property, including the said Todos Santos Rancho property, all to be held by the said Lazard Freres as security for the payment of said indebtedness of complainant to them, and that this was consented and agreed to by complainant and Mrs. Ord, as well as Lazard Freres; and that the said purchase from Mrs. Ord by complainant was consummated on the 24th of February, 1881, and her said indebtedness assumed by complainant, and that complainant joined Mrs. Ord in the transfer of all of said property to Alexander Weill, as and for security for the payment of the said indebtedness of both complainant and Mrs. Ord, amounting at that time to about \$18,870, with interest, and not otherwise. The bill further alleges that the property was at that time reasonably worth \$30,000, and at the time of the bringing of this suit was worth \$100,000; that at the time of the execution of the deed of date February 24, 1881, it was covenanted and agreed between complainant and Lazard Freres that complainant be accepted as sole debtor and obligor for the pre-existing indebtedness of Mrs. Ord and himself to Lazard Freres, and that said deed should be held by them through their said trustee, Alexander Weill, as a mortgage to secure the payment, within one year from the date thereof, of the indebtedness so assumed and owing by complainant to Lazard Freres, and any further advances made by that firm to complainant on the faith thereof. The bill further alleges that, on or about October 29, 1886, Mrs. Ord, for a valuable consideration, and in performance of her legal obligations, and for the purpose of clothing complainant with habiliment of title as the true owner of the premises, made, executed, and delivered to complainant a certain deed, wherein and whereby she conveyed to him all her right, title, and interest in and to all of said parcels of land. The bill further alleges that, since the making of the deed of date February 24, 1881, complainant has been in possession of all of the property, through himself and his tenants, and it alleges his willingness and readiness to pay the amount of the alleged indebtedness to Lazard Freres, and asks a decree permitting him to redeem the property.

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Besides answering the bill the defendant filed a cross-bill, in which it is alleged that he is, and since the fourth day of March, 1881, has been, the owner in fee, and entitled to the possession of all of the property in question; that he derived title thereto through Augustias de la Guerra de Ord, who was, on said fourth day of March, 1881, seised in fee, and in the possession of each of said parcels of land, except that referred to as the "Todos Santos Rancho property," the title to which latter property, it is alleged, was then in cross-complainant in trust for purposes afterwards stated; that on the 16th of May, 1876, Mrs. Ord was seised in fee of each of said parcels of land, and, being so seised, did on that day, for a valuable consideration, execute to cross-complainant her promissory note for \$11,000, and as security therefor executed at the same time to cross-complainant a mortgage upon all of said property; that thereafter, and on or about the ——— day of July, 1877, cross-complainant, at the request of Mrs. Ord, released from the operation of said mortgage the Todos Santos property; that thereafter, and on the ninth day of July, 1877, Mrs. Ord, being still seised in fee of the Todos Santos property, executed to cross-complainant a deed purporting to convey and conveying to cross-complainant in fee-simple the said Todos Santos property, which deed was made and accepted in trust, first, to secure the payment by Mrs. Ord of the amount then due upon her aforesaid note and mortgage, and the payment by the defendant, Moise Kahn, to cross-complainant of the sum of \$5,000, with interest, to be thereafter advanced and loaned to him by cross-complainant; and, after such payments, in trust to convey the said Todos Santos property to defendant Kahn, in pursuance of a written request and written instructions signed by Mrs. Ord, and addressed to cross-complainant, and delivered to him contemporaneously with the delivery of the deed of July, 1877, and as a part of the same transaction, which request and instructions were in the words and figures following, to wit:—

"SANTA BARBARA, July 9, 1877.

"*Alexander Weill, Esq.*—DEAR SIR: My deed of conveyance of the date of July, A. D. 1877, conveying to you my undivided interest in the rancho Todos Santos y San Antonio;

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will be handed to you by my son-in-law, Mr. M. Kahn, and to him you will please pay the consideration expressed in said deed. You will also, upon the repayment to you of your money and interest, convey by proper deed the property described in my deed to you to Mr. Kahn, and for Mr. Kahn's security give him such writings as shall evidence his right to such conveyance upon repayment to you being made, and be mutually satisfactory to you and him. I am owing Mr. Kahn, and he is to receive the property after you are paid.

“Yours, very truly, A. DE. ORD.”

The cross-bill further alleges that subsequently, to wit, on the 6th of August, 1877, the defendant thereto, Moise Kahn, executed to cross-complainant his promissory note for the sum named in said deed as the consideration thereof, namely, \$5,000, and interest, and that thereupon and thereafter cross-complainant, in pursuance of the aforesaid instructions of Mrs. Ord, advanced to Kahn the said sum of \$5,000; that afterwards, to wit, November 14, 1877, in pursuance of the instructions contained in said letter of July 9, 1877, cross-complainant executed to said Moise Kahn the defeasance referred to in the bill and hereinbefore set out. The cross-bill further alleges that, on said 14th of November, 1877, Mrs. Ord and Moise Kahn were indebted to cross-complainant in the aggregate sum of \$11,000, evidenced by their promissory notes mentioned in said defeasance; that thereafter, to wit, on the twenty-fourth day of February, 1881, the said notes of Mrs. Ord and Moise Kahn were unpaid, and they were still indebted to cross-complainant in a large sum of money secured by the aforesaid mortgage and deed, to wit, in a sum exceeding \$18,000, and the said indebtedness, and cross-complainant's right of action therefor, were about to become barred by the statute of limitations of California; that cross-complainant was therefore about to commence an action against the said Mrs. Ord and the said Moise Kahn to foreclose the said liens, and so informed them; that the value of the property was not then equal to the amount of the liens; that thereupon Mrs. Ord, acting under the advice and with the consent of Kahn, proposed to cross-complainant that, instead of foreclosing the said mortgage and liens, cross-complainant

should pay to Mrs. Ord the probable costs of such foreclosure, and should surrender the said notes and evidences of indebtedness of Mrs. Ord and of Moise Kahn to be canceled, and that, in consideration thereof, and in full discharge of said indebtedness, she would execute to cross-complainant a deed conveying to and vesting in him a perfect title to each of said parcels of land, free from any and all equities of the said Mrs. Ord and of Kahn; that said proposition was accepted by cross-complainant, and, on the 24th of February, 1881, a deed purporting to convey each of said parcels of land to cross-complainant in fee-simple absolute was prepared by him, in which Mrs. Ord and Moise Kahn were named as grantors, and cross-complainant as grantee, which was sent to defendant Kahn, at Petaluma, in Sonoma County, to be executed and acknowledged by him, and that he was then and there informed by cross-complainant that he was made a grantor in said deed, because the aforesaid instrument given to him by cross-complainant on the 14th of November, 1877, had provided for a conveyance to him of a portion of the property upon payment of the said indebtedness; that, after being so informed, the defendant Kahn did, on the said twenty-fourth day of February, 1881, execute and acknowledge the said deed before a notary public in and for Sonoma County, and did then return the same to cross-complainant to be executed by Mrs. Ord; that cross-complainant thereupon forwarded the said deed to Mrs. Ord, who was then a resident of Santa Barbara County, to be executed by her; that on the fourth day of March, 1881, Mrs. Ord, in consideration of the payment to her by cross-complainant of the sum of \$200, and of the release and discharge by cross-complainant of all of the aforesaid indebtedness of herself and of Moise Kahn, did sign, acknowledge, and deliver to cross-complainant the said deed, which was thereafter and on the same day filed for record and recorded in the office of the recorder of Santa Barbara County; that, upon receipt of said deed from Mrs. Ord, cross-complainant paid to her the sum of \$200, and surrendered to her her aforesaid promissory note; and thereafter, to wit, on the 9th of March, 1881, cross-complainant did cancel and surrender to defendant Kahn, all notes and evidences of his said indebted-

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ness, and did discharge him from all obligations to pay the same. The cross-bill further alleges that, upon receiving said deed, cross-complainant did enter thereunder upon and take possession of each of said parcels of land, except the Todos Santos Rancho property, and did hold and retain possession thereof, claiming title thereto under said deed, until some time in the month of October, 1886; that at the time of the execution of the deed of date February 24, 1881, the title of Mrs. Ord to the Todos Santos Rancho property was held subject to a life-estate, then vested in one Teresa Hartnell, who died thereafter, and that upon her death cross-complainant entered upon and took possession thereof under the deed of date February 24, 1881, and held such possession until some time in October, 1886. The cross-bill further alleges that, on the 8th of October, 1886, and while cross-complainant was so in possession of each of said parcels of land, except the Todos Santos property, and claiming and having title to all of said parcels under said deed of date February 24, 1881, the defendant Kahn induced Mrs. Ord to execute, acknowledge, and deliver to him a deed, bearing date on that day, purporting to remise, release, and quit-claim unto him, the defendant Kahn, his heirs and assigns, the right, title, and interest of the grantor in and to the Todos Santos Rancho property, which deed the defendant Kahn filed for record on the 12th of November, 1886, in the office of the recorder of Santa Barbara County; that thereafter, to wit, on the 29th of October, 1886, and while cross-complainant was still in possession of each of said parcels of land, except the Todos Santos property, and claiming and having title to all of said parcels under said deed of date February 24, 1881, the defendant Kahn induced Mrs. Ord to execute, acknowledge, and deliver to him a deed, bearing date on that day, purporting to remise, release, and quit-claim to him, the defendant Kahn, his heirs and assigns, the right, title, and interest of the grantor in and to each of said parcels of land. The cross-bill further alleges that, ever since the execution of the deeds of October 8 and October 29, 1886, the defendant Kahn has claimed and still claims to have acquired thereunder from Mrs. Ord, and to have the legal and equitable title to each of said parcels of land, and

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denies the title and right of possession thereto of cross-complainant. It further alleges that the deeds of October 8 and October 29, 1886, were made to Kahn without consideration; that at the time of their execution the grantor therein did not have or claim to have any right, title, or interest in or to either of said parcels of land, and that the defendant Kahn, in accepting the same, well knew that the grantor therein had already conveyed her title thereto to cross-complainant, and that she no longer claimed to have any right to or interest therein, and that said deeds did not, in fact, operate to convey to or vest in the defendant Kahn any title to or interest in either of said parcels. The cross-bill further alleges that, on the 28th of January, 1887, the defendant Kahn caused to be published in a newspaper published and largely circulated and read in Santa Barbara County, a notice stating, among other things, himself to be the owner of all of said parcels of land, and that cross-complainant did not acquire the ownership or right of possession of any of said land by the aforesaid deed of date February 24, 1881. The cross-bill also contains allegations concerning the taking of possession of the premises in controversy subsequent to the month of October, 1886, by parties entering under the defendant Kahn, and in respect to the bringing of actions at law by cross-complainant to recover possession from such parties. It also makes reference to the allegations contained in the bill respecting the agreement under which the deed of date February 24, 1881, was executed, and denies each and every of its allegations respecting that matter, as also the averments of the bill in regard to the deed made by Mrs. Ord to the defendant Kahn, of date October 29, 1886; and, to the contrary, alleges that the deed of date February 24, 1881, was not intended as a mortgage or other security, but was in fact, what it purported to be, a deed absolute, conveying to cross-complainant in fee-simple all of the said parcels of land, and was so intended by all of the parties thereto; that the claims of the defendant Kahn, in respect to the deed of date February 24, 1881, as well as to the deeds of October 8 and October 29, 1886, under which he also asserts title to the premises, constitute a cloud upon the cross-complainant's title thereto, and have and do impair the

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market value of said property, and embarrasses and prevents cross-complainant's enjoyment thereof. The prayer of the cross-bill is for a decree adjudging the cross-complainant to be seised in fee and entitled to the possession of each of said parcels of land; that the defendant Kahn has no title, estate, or interest at law or in equity in either of them; that the deed of date February 24, 1881, was intended by all of the parties thereto to be, and that it was in fact, an absolute conveyance of the premises described therein to cross-complainant, and was not intended to be, nor was it in fact, a mortgage or deed of trust; that neither of the deeds of October 8, 1886, and October 29, 1886, conveyed any right, title, or interest in or to the said parcels of land, or either of them; that the deeds of October 8 and October 29, 1886, create a cloud upon the title of the cross-complainant, and that the defendant Kahn be required to surrender the same for cancellation, and that he be enjoined from hereafter claiming or asserting any right or title thereunder.

I shall not undertake to refer in detail to all of the evidence in the case, for the record is too voluminous to admit of such reference without extending this opinion beyond all reasonable limits; but I will state as briefly as I can the reasons for the conclusion to which I have come, after a careful consideration of the case, which is the same conclusion to which I was inclined at the trial. If the deed of date February 24, 1881, was, in fact, what it purported to be, a deed absolute, then, manifestly, those of October 8, 1886, and October 29, 1886, from Mrs. Ord to Moise Kahn, conveyed nothing, and they become unimportant, except in so far as they, together with the circumstances under which they were executed, tend to throw light upon the true nature of the deed of date February 24, 1881, and except in so far as they may cast a cloud upon the title set up in the cross-bill. As has been already said, the complainant, by his sworn bill, asserts precisely the same right to each of the five parcels of land. Yet it is not pretended that the evidence shows that, prior to the execution of the deed of date February 24, 1881, Mrs. Ord ever executed any instrument conveying to or vesting in him any interest in either of the parcels except the Todos Santos Rancho, and, as to that, the only writings under which

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he claims to have acquired an interest are the power of attorney executed to him on the thirtieth day of May, 1877, and the letter from Mrs. Ord to Alexander Weill, of date July 9, 1877. In respect to the first of these instruments, the complainant, in his testimony given at San Francisco, after referring to Mrs. Ord's indebtedness to him, and his recapitulation of it to her on May 28, 1877, aggregating, as he claims, \$4,528.33, and her promise to pay it, said:—

“I said [to Mrs. Ord]: ‘You have been spending your money, and in a little while you will be without anything. If you go along as you do, you will eat up all there is, and you will have nothing to pay me. Now, I promise this to you: Give me that ranch [meaning the Todos Santos Rancho property] in payment of the money. I will not let you starve, and I want to get into business. I will see you do not want so long as I have anything. You give me that rancho, and so pay me all you owe me.’ *Question* (to complainant). What did she say? *Answer*. Make out the documents. *Q*. Did you do so? *A*. I did. *Q*. What document did you make out? *A*. Power of attorney.”

That is to say, the power of attorney which has been hereinbefore set out, and which was thereupon introduced in evidence. Passing the question of the competency of this evidence of the complainant as to a parol sale by Mrs. Ord of her interest in the Todos Santos Rancho, and of his claim that the power of attorney was made in furtherance of such parol sale, it is to be observed that the testimony itself is not only directly opposed to that of Mrs. Ord upon the same subject, but it is wholly inconsistent with the recitals of the power itself, by which, as has been seen, complainant was constituted the attorney in fact of Mrs. Ord, for her, and in her name, place, and stead, to manage and control the Todos Santos Rancho property, collect the rents, issues, and profits thereof, and to borrow money, mortgage, bond, lease, or in any way dispose of that property as to him should seem best; all, however, for and in the name, place, and stead of Mrs. Ord, and for the purpose expressly declared in the power itself, which was that, for the reason that she was indebted to complainant, she was desirous that he

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should have the “management, control, and disposition” of the property, to the end, manifestly, that out of the proceeds the debt might be satisfied. So far from the power evidencing a sale by Mrs. Ord to complainant of the Todos Santos property, it did not vest in complainant any interest therein; in other words, it was not a power coupled with an interest, for it did not purport to vest in complainant any interest in the land itself, which was the subject of the power, but only in such proceeds as might be realized therefrom by the exercise of the power. (*Hunt v. Rousmianier*, 8 Wheat. 203.) Furthermore, according to complainant’s own testimony, he never performed a single act under and by virtue of the power of attorney. When asked by his counsel what he did with it after it was delivered to him, he answered:—

“I came to San Francisco shortly after that to see Mr. Alexander Weill, and to get some money on that. I explained to him the circumstances, and what I wanted, and presented the power to him; after which he said: ‘Better for your own security if Mrs. Ord make a deed of that ranch to me absolutely, accompanied by a letter from her telling me to give you the amount of money that you speak of, and that, upon the payment of that money back to me, with interest, to reconvey the property to you.’ I requested Mr. Alexander Weill to have the document and deed drawn up himself, and give them to me, and I will send them to her. *Question* (by counsel). Did he do so? *Answer*. Yes, sir. The next day he had the papers ready, and handed them to me, and I forwarded them by mail. *Q*. What, then, did you do with the power of attorney that you have just offered in evidence here? *A*. I did not do anything; I put it in my pocket.”

Mrs. Ord was at this time in Santa Barbara County, where she resided, and was therefore entirely ignorant of the preparation of the deed and letter of July, 1877, which were drawn by the attorney of Weill in San Francisco, at the request of complainant. The deed was an absolute deed in form, from Mrs. Ord to Alexander Weill, for the Todos Santos property, expressing a consideration of \$5,000, and was, according to the testimony of complainant just quoted, made to take the place

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of the power of attorney for the better security of complainant; whereas, according to the sworn averments of the bill, which are admitted by the answer, Weill preferred for his own security to make the loan upon a deed from Mrs. Ord to himself, and required, as further security, the execution of complainant's note for the amount of the loan—\$5,000. The letter has been already set out in full. Like the power of attorney, not only does it fail to support the testimony of complainant that there was a parol sale by Mrs. Ord to him of the Todos Santos property in May, 1877, in liquidation of her indebtedness to him, which he claims then amounted to \$4,528.33, but in terms it excludes any such idea. It expressly recites that she then (July 9, 1877) owed him money; and it is nowhere pretended that Mrs. Ord incurred any indebtedness to complainant between the time of the execution of the power of attorney and the preparation of the deed and letter of July, 1877. It directed Weill to pay the consideration expressed in the deed, which was \$5,000, and several hundred dollars more than complainant claims that Mrs. Ord then owed him, to complainant, and that, upon the repayment of the sum borrowed, with interest, Weill convey the property to complainant by deed, the reason therefor being stated in these words: "I am owing Mr. Kahn, and he is to receive the property after you are paid;" and for complainant's security Weill was, by the letter, directed to give complainant such writings as should evidence his right to such conveyance. This letter, together with the deed, was sent by complainant to Mrs. Ord at Santa Barbara, who signed and acknowledged the deed, and signed the letter, and returned them to complainant; and upon the delivery of the deed to Weill, and the execution by complainant of his note as further security for the amount, Weill paid complainant, from time to time as he called for it, the consideration mentioned in the deed, namely, \$5,000, and subsequently signed and delivered to him the defeasance hereinbefore set out.

Even if complainant had repaid the \$5,000 so loaned by Weill, with interest, and had received from him a deed for the Todos Santos property, I consider it perfectly clear that he would have held it, not absolutely, but only as security for

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such money as Mrs. Ord really owed him. The letter did not pretend to say that after Weill was paid complainant was to receive the property, absolutely, in payment of Mrs. Ord's debt to him; and, if it had, there was no agreement on complainant's part to receive it in such payment. Besides, in the defeasance which Weill executed to complainant, and which he accepted, it is expressly stated that the deed of July 9, 1877, was given to secure, *first*, the \$5,000, with interest, expressed as its consideration, and which was, as already said, further secured by complainant's note; and, *second*, the balance due on the \$11,000 note executed by Mrs. Ord on March 16, 1876, which balance then amounted to \$6,240.92, and which was also secured by the mortgage given at the time of the execution of the note, and which was then still existing on all of the property originally embraced in it, except the Todos Santos Rancho. If, as complainant contends, the Todos Santos property was to become his, absolutely, upon the repayment of the \$5,000 borrowed from Weill in July, 1877, it is difficult to understand why it should be held by Weill as additional security for the balance due by Mrs. Ord on her \$11,000 note, of date March 16, 1876. Moreover, Mrs. Ord, in her testimony, explicitly denies that she ever sold or agreed to sell the property to complainant, or that her indebtedness to him was anything like the amount claimed by him, or that the letter to Weill was intended by her to authorize the transfer of the property to complainant, absolutely; and that such was not the fact is further evidenced by a letter to complainant, of date July 12, 1877, from Mrs. Ord's daughter Rebecca, now Mrs. Pechine, who, it appears from the evidence, conducted, on the part of her mother, her correspondence with complainant, in which letter Mrs. Pechine says:—

“Regarding that document and letter [meaning the deed and letter of July 9, 1877] that my mother signed, and which you sent from San Francisco, my mother thinks it well for you to ask of Lazard Freres a ‘receipt’ of that letter which she signed. Pancho Gutierrez came to acknowledge her signature, and read the document [meaning the deed] which you sent, and he said it was a *venta absoluta* [absolute conveyance]. I know nothing about those documents, and of course I had nothing

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to say to that. About the receipt of that letter which mother signed, she says it is well for you to send it to her when obtained, because you might meet with an accident, or supposing you die, etc., it is better for her to have it."

If complainant's theory be accepted, it was no concern of Mrs. Ord what should become of the paper to be given by Weill in acknowledgment of the deed and letter. No other or further instrument or instruments were executed by Mrs. Ord in relation to any of the property in controversy, prior to the deed of date February 24, 1881, which is the deed the complainant asks to have adjudged a mortgage, and from which he seeks to redeem. A number of letters preliminary to the execution of that deed passed between the respective parties, and are in evidence, which leave no doubt as to its true intent and purpose. In January, 1881, the indebtedness to Lazard Freres not having been paid, and being about to become barred by the statute of limitations of California, that firm addressed, on the sixth day of that month, to complainant this letter:—

"BANKING HOUSE OF LAZARD FRERES,

"SAN FRANCISCO, January 6, 1881.

"*Moise Kahn, Esq., Petaluma, Cal.*—DEAR SIR: The mortgage held by us on the Santa Barbara properties of Mrs. Ord will shortly outlaw. We beg to request that you come into the office on the occasion of your first visit to San Francisco, and arrange for its renewal. Please answer what you intend doing about it.

Yours, truly,

"LAZARD FRERES, per E. J. LE BRETON."

On the 19th of the same month Lazard Freres wrote to Mrs. Ord as follows:—

"BANKING HOUSE OF LAZARD FRERES,

"SAN FRANCISCO, January 19, 1881.

"*Mrs. A. de Ord, Santa Barbara, Cal.*—DEAR MADAM: Your mortgage to Alexander Weill will be outlawed by limitation within a few months from this date. Please write to us immediately what you propose to do concerning its payment or renewal.

Yours, very truly,

"LAZARD FRERES, per E. J. LE BRETON."

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To which Mrs. Ord replied, by letter addressed to Lazard Freres:—

“Your note of 19th inst. was duly received, concerning the mortgage to Alexander Weill. All I can say is that for the present I am unable to pay it, and if you wish for me to renew my note I will willingly do so. Please write to Moise Kahn, Petaluma, to ascertain what hopes he has of raising money for its payment, and oblige,

“Yours, truly,

A. DE ORD.”

On the 28th of January, Lazard Freres wrote to complainant as follows:—

“BANKING HOUSE OF LAZARD FRERES,

“SAN FRANCISCO, January 28, 1881.

“*Moise Kahn, Esq., Petaluma, Cal.*—DEAR SIR: We are in receipt of a letter worded as follows, from Mrs. A. de Ord, Santa Barbara:—

““Your note of 19th inst. was duly received, concerning the mortgage to Alexander Weill. All I can say is that for the present I am unable to pay it, and if you wish for me to renew my note I will willingly do so. Please write to Moise Kahn, Petaluma, to ascertain what hopes he has of raising money for its payment, and oblige, Yours, truly, A. DE ORD.”

“We now beg to notify you that, unless Mrs. Ord consents to give us a deed, we shall commence to foreclose on the 1st of February. We expect therefore to hear from you by return mail.

Yours, truly,

“LAZARD FRERES, per E. J. LE BRETON.”

To this letter complainant replied on January 31st, as follows:—

“PETALUMA, January 31, 1881.

“*Messrs. Lazard Freres, San Francisco*—GENTS: Yours of the 28th inst. only reached me this evening. On account of the storm which prevailed during the last three days all communication with your city had been stopped, and this evening is the first time we received the mail. Mrs. Ord, I have no doubt, will be very glad to give the deed for the consideration of a few dollars, that is to say, the amount it would cost you to foreclose.

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I will write to her to this effect this evening, and upon return mail, if you do not hear from [her], then go ahead and foreclose. I think there is plenty of time ahead. If I am not mistaken, her note will only outlaw by the middle of next month; that is to say, by middle of March. By agreeing to the about request, you will confer a favor to

“Yours, very truly, MOISE KAHN.

“Say, to hear from her until the 8th or 10th of March.”

On the same day complainant wrote to Lazard Freres the letter last quoted, to wit, January 31, 1881, he wrote to Mrs. Ord, on the back of the letter of January 28th he had received from them, in Spanish, of which the following is a translation:—

“VERY DEAR DONA AUGUSTIAS: I have just received this letter which I hasten to forward to you. I do not think that was the way to write, principally with sarcasm respecting me. I have written to Lazard Freres that you would consent to give them a deed to the properties for what it would cost to foreclose the mortgage, to which effect you should write them. I also wrote to them to wait, and I have no doubt they will do it. So that, if you wish to obtain a few hundred dollars, write to them immediately, and do not forget to do so. Caroline with the last storm took cold, and is now in bed. Without doubt nothing serious.

“I remain your son, who loves you, M. KAHN.”

On the 4th of February, Mrs. Ord wrote Lazard Freres as follows:—

“SANTA BARBARA, February 4, 1881.

“Messrs. Lazard Freres, San Francisco—GENTLEMEN: I received a letter from Mr. Moise Kahn, of Petaluma, with your favor to him of the 28th ulto. enclosed. I am at present in reduced circumstances, and therefore unable to redeem the property I mortgaged to A. Weill. I will most willingly give you a perfect deed of said property if you will give me the money that it will cost you to foreclose the mortgage. Thus I will save you considerable trouble, and it will greatly oblige me. I have forgotten to let you know that part of block 217

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of the town property, and other small pieces adjoining, are planted in grain and barley, and I request you to let me raise the crop. As soon as you desire, I will be ready to give you the deed. Please correspond with me directly, and not with Mr. M. Kahn in this business, and oblige,

“Yours, truly, AUGUSTIAS ORD, per REBECCA ORD.”

A copy of this letter was also indorsed by Rebecca for Mrs. Ord on the back of the letter of January 28th from Lazard Freres to complainant, and which he forwarded to Mrs. Ord with his letter to her of January 31st indorsed on its back. To this letter from Mrs. Ord, Lazard Freres replied, on February 9th, as follows:—

“SAN FRANCISCO, February 9, 1881.

“*Mrs. Augustias de la G. de Ord, Santa Barbara*—MADAM: We beg leave to own receipt of your favor 4th, 1881, and noted contents. We have handed the papers to our attorneys, and when they are ready we shall forward them to you for signature, with some compensation for cost of foreclosure &c. We shall not be severe about the crop, concerning which you make the request.

Yours, respectfully,

“LAZARD FRERES, per E. J. LE BRETON.”

Accordingly, the San Francisco attorneys of Lazard Freres prepared the deed of February 24, 1881, in which Mrs Ord and complainant were named as grantors, and Alexander Weill as grantee, and which deed embraced all of the property which Lazard Freres, through Alexander Weill, held as security for the money due from those parties. This deed Lazard Freres first transmitted to complainant, at Petaluma, together with the following letter:—

“BANKING HOUSE OF LAZARD FRERES,

“SAN FRANCISCO, February 24, 1881.

“*To Moise Kahn, Esq., Petaluma*—DEAR SIR: We have caused a deed to be made out from Mrs. Ord and yourself to our Alexander Weill, with the dates in blank. Please sign the same before a notary public, and see that the necessary dates, left in blank, are filled out. The reason we are obliged

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to make you a party to this deed is that you are mentioned in the defeasance given by Alexander Weill at the time that the interest in the Todos Santos Rancho was conveyed by absolute deed to him by Mrs. Ord. Please return the enclosed deed with all possible dispatch, as otherwise we shall be obliged to commence proceedings in foreclosure, our time being exceedingly short.

Very truly yours,

“LAZARD FRERES, per E. J. LE BRETON.”

The deed was signed and acknowledged by the complainant, and delivered in person by him to Le Breton, who was, at that time, in the employ of Lazard Freres, and who, as will have been observed, conducted the correspondence on their part. Le Breton thereupon consulted with the San Francisco attorneys of the firm in respect to the amount proper to pay Mrs. Ord under their promise to give her what it would cost to foreclose, and, the sum of \$200 being fixed upon, that sum, together with the evidences of Mrs. Ord's indebtedness, was sent by Lazard Freres to their attorney in Santa Barbara, who paid the money to Mrs. Ord, and delivered to her the evidences of her indebtedness, whereupon she signed and acknowledged the deed, and delivered it to the attorney of Lazard Freres, who thereupon filed it for record in the county where the property is situated, and notified Lazard Freres of the fact, whereupon they delivered up to complainant the evidences of his indebtedness to the firm. From that day to this, so far as appears, Lazard Freres have never claimed, demanded, or received one cent from Mrs. Ord or complainant, or held any evidence of indebtedness against them, or either of them. It is absurd to suppose that those experienced bankers would have delivered up the evidences of the indebtedness, then amounting to over \$18,000, unless the debts for which they stood were paid; or that, when complainant received the surrender of the \$5,000 note he had executed to them, he did not know that it had been paid, together with the note of Mrs. Ord, by the conveyance of the property to Weill for Lazard Freres. At the time of the execution of the deed of date February 24, 1881, Lazard Freres already had a lien upon all of the property to secure the then existing indebtedness. There was therefore no occasion for

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another mortgage; nor did they want the land, for the evidence is abundant that they had been urging the payment of the amounts due, and that the complainant, acting for Mrs. Ord, had been making every effort to sell the property, but without success; and that he had informed Mrs. Ord that Lazard Freres wanted the money due them, and not the land, is shown by the testimony of Mrs. Pechine, in which she says that long before the making of the deed of date February 24, 1881, complainant had so told her mother, and that they had talked about the matter several times, and she added: "But when we gave the deed of the property to Lazard Freres [referring to the deed of date February 24, 1881] we never talked about it any more. We talked about it long ago when we were in hopes of regaining the property, but when we gave the deed we considered it an absolute deed, and didn't mention it any more." The fact is, as is clearly shown by the evidence, that during the times referred to, and for many years after the making of the deed of February 24, 1881, real estate was greatly depressed in Santa Barbara County, and there was little or no sale for it; and the probability is that, had the liens held by Lazard Freres been foreclosed, the property would not have brought the amount of the judgment. But a consummated judicial sale would have extinguished the liens, and vested the absolute title to the property in the purchaser. The deed in question was made to take the place of such sale, for an additional consideration paid by Lazard Freres to Mrs. Ord, of the estimated cost of foreclosure, at the suggestion of complainant himself, made in his letters to Lazard Freres and Mrs. Ord of January 31, 1881, and freely and gladly accepted by her, as evidenced not only by her letters already quoted, but by her testimony given in this case, as well as by that of her daughter, Mrs. Pechine, who acted for her throughout the correspondence and interviews relating to the matter, both of which witnesses appear to have testified with the utmost candor and truth, and with much intelligence as well, and both of whom say that the deed in question was intended to be just what it purports to be, a deed absolute. And that such was also the clear and distinct understanding of complainant, I have no manner of doubt.

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Any other conclusion would be wholly inconsistent with his own letters, and with the acts of all the parties at the time and subsequently. It is not pretended that Lazard Freres took from complainant any evidence of the indebtedness he now claims to have assumed by the transaction in question, or that they ever afterwards demanded of him payment of one dollar of such indebtedness, or that he ever paid one dollar of it; yet the court is asked to believe that the indebtedness in fact existed by express agreement of the parties, and that, without demanding payment of principal or interest, Lazard Freres stupidly went to sleep until the debt had become barred by the statute of limitations. This I cannot accept as true. I am entirely satisfied that the deed in question was by all of the parties to it intended to be exactly what it purported to be, a deed absolute, without any qualifications or conditions. By its execution Mrs. Ord not only discharged all of her indebtedness to Lazard Freres, and received \$200 additional, but overpaid complainant by several hundred dollars, according to his estimate of her indebtedness to him, and by several thousand dollars, according to her estimate of it; for his note evidencing the \$5,000 he received from Lazard Freres was thereby paid and discharged, and surrendered to him, whereas Mrs. Ord's indebtedness to him, according to his own claim, was but a little over \$4,500.

Recurring to the bill which, as has been said, is verified by the oath of complainant, it is seen that it alleges, in substance, that about the month of January, 1881, Mrs. Ord being indebted to Lazard Freres and complainant, and her indebtedness to Lazard Freres being then about to become barred by the statute of limitations of California, the said Lazard Freres moved and induced complainant to, and he did procure Mrs. Ord to sell all of her said property, together with her equity of redemption therein, to complainant, with the understanding and agreement that complainant should and would assume the payment of the entire indebtedness of Mrs. Ord to Lazard Freres, and join her in the conveyance and transfer of the whole of the said real property, including the said Todos Santos Rancho property, all to be held by the said Lazard Freres as

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security for the payment of said indebtedness of complainant to them, and that this was consented and agreed to by the complainant and Mrs. Ord, as well as Lazard Freres; and that the said purchase from Mrs. Ord by complainant was consummated on the 24th of February, 1881, and her said indebtedness assumed by complainant, and that complainant joined Mrs. Ord in the transfer of all of said property to Alexander Weill, as and for security for the payment of the said indebtedness of both complainant and Mrs. Ord, amounting at that time to about \$18,870, with interest, and not otherwise. It will not be necessary to decide whether the agreement thus alleged would be valid unless evidenced by writing, for it is not supported by proof of any kind. It is not sustained by the testimony of the complainant himself, and is wholly inconsistent with his own letters. It is positively denied by Mrs. Ord, and by David Cahn, at the time a member of the firm of and manager for Lazard Freres, at San Francisco, and the person with whom complainant claims to have carried on the negotiations. So far from Lazard Freres inducing complainant to procure Mrs. Ord to sell the property in question to him upon the understanding that he would assume her indebtedness, and so far from his assuming that indebtedness, as the bill alleges, his own letters show that, when informed by Lazard Freres that the indebtedness must be paid, or they would be compelled to commence suit to foreclose the liens, unless a deed was given for the reason that the debt was about to become barred by the statute of limitations, it was he who suggested to Lazard Freres that Mrs. Ord would, and who advised her to, give a deed to them for the property, if they would pay her what it would cost them to foreclose; and in that deed to Lazard Freres complainant joined as a grantor, without objection, when expressly informed in the letter transmitting it to him for execution that he was made a grantor only because he was "mentioned in the defeasance given by Alexander Weill at the time that the interest in the Todos Santos Rancho was conveyed by absolute deed to him by Mrs. Ord."

The complainant was examined as a witness, first at Santa Barbara, and then in San Francisco. In his examination in

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San Francisco he was questioned, among other things, about the letter written by him to Mrs. Ord on the 31st of January, 1881, on the back of that received by him from Lazard Freres, and he was asked by his counsel if he had written a second letter the same day to Mrs. Ord, in relation to the same matter, and he said that he had. Complainant's counsel then called upon the opposite counsel, to whom had been given by Mrs. Pechine and Mrs. Ord all the letters relating to the controversy they had or knew anything about, to produce the second letter spoken of; and the counsel replying that he did not have such a letter, and never before heard of such a one, the complainant proceeded to testify as follows:—

“The contents of the letter was that I also said that by this mail I wrote to you, and the sum and substance of the letter is a repetition of the first letter just mentioned, with the following added to it, in Spanish, and it is very clear to my memory: ‘Que al fin y al acabo tengo el deracho de redemir estes propiedades que no tengo cuidado.’ I recollect I wrote something else. These gentlemen don't want any property; all they want is their money.”

The translation given of the Spanish above quoted is: “At all events I have the right of redemption of those properties; you don't need to fret about it.” There are many reasons why I do not believe this testimony of complainant in regard to a “second letter” to Mrs. Ord, on the 31st of January, 1881: (1) If he had secured the right of redemption, and wanted to tell Mrs. Ord at all, it is highly improbable that he would not have mentioned the fact in the letter which he undoubtedly did write, and which she received, and which has been produced in evidence. (2) There would have been no occasion for his repeating in a second letter, on the same day, what he had just written in the first. (3) The testimony given in San Francisco was given in 1887. It is extremely improbable that the witness could remember the precise Spanish words used by him more than six years before, especially when, in his testimony given at Santa Barbara, he testified to but one letter, and did not then recollect that, on the 31st of January, 1881, he had written the advice to Mrs. Ord upon the back of the letter that he had on

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that day received from Lazard Freres. (4) Mrs. Pechine testifies that she thinks she preserved all of her mother's letters relating to business, and only one of that date was found, and that she never, to her recollection, saw the second letter referred to. To the same effect is the testimony of Mrs. Ord. (5) The letter of Mrs. Ord, of date February 4, 1881, written upon the suggestion of complainant contained in his letter to her of January 31st, written on the back of the letter of Lazard Freres to him, was manifestly carrying out the suggestions of that letter, and makes no allusion to the matter of redemption which complainant claims was communicated by the second letter spoken of by him. (6) Complainant's letter to Lazard Freres on the same day, referring to his letter to Mrs. Ord, makes no reference to a right of redemption. (7) The testimony given by complainant is inconsistent with his own letters, and with the averments of the bill, sworn to by him, as already pointed out. (8) The new matter claimed to have been embraced by the second letter spoken of is not shown to have been true, but the contrary.

In his testimony complainant details the agreement he claims to have had with David Cahn prior to the making of the deed of date February 24, 1881, respecting the property. The substance of the agreement, as stated by him, is that Mrs. Ord was to be induced to execute the deed conveying the property to Weill, instead of submitting to a foreclosure, thereby canceling her indebtedness and receiving in money the estimated cost of foreclosure, and Weill was to hold the title so conveyed for the benefit of complainant, who was to be "carried [by Lazard Freres] at a reduced rate of interest for a year or two," and allowed to redeem the property by paying the amount of the indebtedness existing at the time of the execution of the deed, with interest at a reduced rate, and costs subsequently incurred in caring for the property. If such an agreement had been in fact made, I am unable to understand by what legal process the property of Mrs. Ord could be thus vested in complainant. It is not pretended that up to the time of the execution of the deed of date February 24, 1881, complainant had any interest in any of the property in controversy, except the Todos Santos

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Rancho, and that he had no interest of any nature in that rancho I think has already been shown. There is no rule of law of which I have any knowledge under which such an arrangement as is stated by complainant could be made to operate to vest Mrs. Ord's title in him. Besides, a party who comes into a court of equity must do so with clean hands. That, so far as Mrs. Ord is concerned, the deed of date February 24, 1881, was intended as an absolute conveyance of all her right, title, and interest in all of the property, is undisputed, even by the complainant himself. Indeed, his case is based upon that theory; and yet, while acting as the trusted agent of that lady, who was his mother-in-law and an aged woman, he claims to have made such an arrangement with the manager of Lazard Freres as that he could thereby acquire her property, in four pieces, of which it is not pretended he then had any interest, by subsequently paying the amount of the indebtedness at a reduced rate of interest. Such an arrangement, if it had been made, would have been unconscionable in the extreme, and such as no court of equity ought to enforce in favor of the party making it. But the testimony of complainant in regard to the agreement is not only inconsistent with his letters, but it is positively denied by David Cahn, who explicitly states in his testimony that he never made any agreement with complainant by which he was to assume the indebtedness of Mrs. Ord and himself theretofore existing, or by which the deed in question was to be considered other than what it purported to be, a deed absolute, or by which complainant was to be entitled to redeem the property under any circumstances or conditions; and complainant's testimony is, in many respects, also at variance with that of various other witnesses, and upon the vital points in the case, is in itself highly improbable. The conduct of the parties subsequent to the execution of the deed of February 24, 1881, was not inconsistent with the absolute ownership of the property by Weill, who, as has been stated, stood in the place of Lazard Freres. There is no doubt that they preferred the money to the land, not only at the time they took the deed in question, but for many years after; and through David Cahn gave complainant the privilege of selling it, and retaining what he could

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get over and above what it had cost them, with interest and expenses. During all of this time the relations of the parties continued intimate, and complainant made every effort to sell the property, but without success. At times Lazard Freres were willing and anxious to take less than the property had cost them, with interest and expenses. In July, 1885, when the amount had reached over \$31,000, David Cahn told complainant they would take \$28,000; and in July, 1886, when the amount exceeded \$35,000, he told him they would take \$30,000; but complainant was unable to effect sales. During this time, covering a period of over five years, many interviews occurred, and many letters passed between the parties. In this correspondence I have observed no letter from complainant in which he asserted or assumed that any of the property belonged to him. Only one letter during those years assumed the existence of an indebtedness from him to Lazard Freres. That letter was written on the 24th of July, 1885, more than four years after he claims to have assumed towards Lazard Freres, by a verbal agreement, the position of debtor. This letter requests Lazard Freres to send him "a memorandum of what I owe," adding, "I will be entirely guided by what I owe," etc. This letter was answered by Altschul, one of the firm's accountants, in which it is said, "Your account will be sent shortly." Altschul testifies that he knew nothing about the understanding between David Cahn and complainant, and David Cahn testifies that he never saw the letter. The adoption by Altschul of the language of the letter he was answering, and using the term "your" instead of "the," should not, as justly observed by counsel, be accorded much significance. But this very letter of Altschul to complainant enclosed a copy of a letter written by Eugene Meyer, as attorney in fact for Weill, to a person who was supposed to be a tenant of Mrs. Hartnell, who had a life-estate in the Todos Santos Rancho, proposing to rent the rancho to him, and complainant's attention is called by this letter to "the party now on Mr. Weill's property," and complainant is therein requested to "take no steps which will conflict with our direct instructions to that gentleman." In several letters from Lazard Freres to complainant they speak of the property as be-

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longing to Weill or themselves. In a letter of October 11, 1881, after asking complainant's opinion as to "the lowest figures we should accept for the Todos Santos Rancho," they say: "Let us see if they agree with ours, and if not, we will have to consult our friends at Santa Barbara, and accept what the ranch is worth." In one bearing date November 15, 1881, they mention certain persons who had applied to purchase "the Todos Santos Rancho owned by us." In one to complainant, dated December 9, 1884, they refer to him a letter from Judge Fernald, proposing to fence the State Street lot, and ask complainant's "opinion of this matter, as far as the fencing of Weill's property is concerned," and ask that he "excuse the trouble given." In a letter from complainant to Eugene Meyer, dated September 12, 1885, he sends a map of the Todos Santos Rancho, and says: "I fervently hope that you will be able to effect an advantageous sale of the lands." In a letter of date December 1, 1885, he says, referring to the State Street lot: "Although you do not say anything about the lot on State Street, . . . if you do sell, I hope you will receive a good round price for it." These letters are inconsistent with the contention of complainant in the present case, but they are consistent with what I think the case clearly shows throughout, that Lazard Freres were anxious to get the money they had invested in the property out of it, and that, because of their unfamiliarity with the land, and their friendly relations with complainant, which then continued to exist, and because of the privilege they had accorded him of selling the property in order that he might make something out of it if he could, they felt justified in asking him for his views in respect to it.

It is urged that the books of Lazard Freres show that the indebtedness continued to exist against complainant after the execution of the deed of February 24, 1881. At the time of the execution of that deed, and for more than a year before, the indebtedness of Mrs. Ord and of complainant was carried upon the books of the firm under the head "Ord-Kahn," as the most convenient method of keeping an account of the moneys loaned and advanced to those parties; but, manifestly, that circumstance did not change the character of the indebtedness, which was evi-

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denced by the promissory notes of Mrs. Ord and complainant which Lazard Freres still held, to an open account against them. When the indebtedness was paid by the conveyance of the property by the deed of date February 24, 1881, all written evidence held by Lazard Freres against Mrs. Ord and complainant was canceled and surrendered to them, but the fact of the payment was not entered in the books under the account headed "Ord-Kahn." Whether or not correct book-keeping required such entry, or whether, as is claimed, the account was properly kept open as an account against the property, to show its cost, and in which to make future entries of costs and expenses paid on account of it, I do not know. But certain it is that the account headed "Ord-Kahn" was never, after the execution of the deed in question, regarded by any one connected with the management of the bank as an account against Mrs. Ord and complainant, or either of them, nor treated as such. No money was ever demanded or received of them, or either of them, thereon, nor could have been, for the simple reason that the indebtedness had been wiped out by the sale and conveyance of the property. Besides, some of the entries made in the account after the execution of the deed exclude the idea that it was kept alive against Mrs. Ord and complainant, or either of them, but are consistent with the claim that it was continued as an account showing the cost to the bank of the property. Certain it is, also, that if the account showed an existing indebtedness against complainant, it showed precisely the same thing in respect to Mrs. Ord; and that would prove too much for complainant's case, which concedes that Mrs. Ord's indebtedness was paid by the conveyance in question and his assumption of the debt. It is incredible that any sane bankers would have allowed so large a debt to stand until it was barred over and over again by the statute of limitations, and that, too, without even ever demanding payment of interest or principal; and it is asking too much of a court to believe that the complainant ever understood that Lazard Freres would permit him to owe them so many thousand dollars without a scratch of his pen to show for it, and without ever calling upon him for interest or principal during all the years that have since elapsed. I think the case is with-

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out any merit on complainant's part, and, accordingly, there will be a decree dismissing the bill, and awarding cross-complainant the relief demanded in the cross-bill, with costs.

IN RE CHUNG TOY HO, ON HABEAS CORPUS.

IN RE WONG CHOY SIN, ON HABEAS CORPUS.

DISTRICT COURT, DISTRICT OF OREGON.

MAY 23, 1890.

1. **WIFE AND CHILDREN OF CHINESE MERCHANT.**—The wife and children of a Chinese merchant, who is entitled under article 2 of the treaty of 1880, and section 6 of the act of 1884, to come within and dwell in the United States, are entitled to come into the country with him or after him, as such wife and children, without the certificate presented in said section 6.

Before DEADY, District Judge.

Mr. Paul R. Deady, for petitioner.

Mr. Franklin P. Mays, for United States.

DEADY, J. These two cases were heard together. The petitioners are the wife and child of Wong Ham, a well-known Chinese merchant, resident in Portland, Or., for some years past.

A short time since he visited China, and returned here on the American bark Coloma, bringing with him the petitioners, who had never been in the United States. Here Wong Ham, being provided with the certificate required by section 6 of the act of July 5, 1884 (23 Stats. 116), was allowed to land. But the petitioners, having no such certificate, their right to land was denied by the collector.

They then sued out writs of habeas corpus directed to the master of the Coloma, who made return, admitting the facts stated in the petition and the detention, and stating the cause thereof to be the refusal of the collector to allow the petitioners to land.

The district attorney was allowed to intervene on behalf of the United States, and the cases were heard on the facts stated in the respective petitions.

The action of the collector in refusing to allow the petitioners to land was based on a decision of the treasury department of August 19, 1889 (Treas. Doc. 409), in which it was said that the wife of a Chinese merchant who has never been in the United States cannot be allowed to enter the United States, with or without her husband, otherwise than upon the production of the certificate required by section 6 of the act of July 5, 1884. By the treaty with China of November 17, 1880 (22 Stats. 827), it is provided that:—

“Chinese subjects, whether proceeding to the United States as teachers, students, merchants, or from curiosity, together with their body and household servants, and Chinese laborers who are now in the United States, shall be allowed to come and go of their own free will and accord, and shall be accorded all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nation.”

By section 6 of the act of July 5, 1884 (23 Stats. 116), professedly passed “to execute” the stipulations of this treaty, a certain certificate is required for the admission into the United States of “every Chinese person,” other than a laborer, who may be entitled by said treaty to such admission.

Then came the act of October 1, 1888 (25 Stats. 504), by which the coming or return of Chinese laborers to the United States is absolutely forbidden.

The manifest purpose of this legislation is to exclude Chinese laborers from coming or returning to the United States. The other classes — “teacher, student, and merchant” — are not required to have certificates before they can be admitted into the country, because their admission is intended to be restrained or limited, but to prevent laborers from being admitted under the guise or in the character of such classes.

There is no limitation on the right of these classes to come within and dwell in the United States. The statute only requires that such a person shall furnish the prescribed evidence that he belongs to one of these favored classes, when he may come and go at pleasure.

The admission of the petitioners is not within the mischief that the exclusion act was intended to remedy. They are both

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females, the child being about eight years of age. It is common knowledge, that Chinese women are not laborers. The station in life of the petitioners, being the wife and child of a merchant, also shows they do not belong to the laboring class.

The petitioners are not within the purview of the exclusion act of 1888, which is confined to laborers. Do they come within that of section 6 of the act of 1884, which requires "every Chinese person," other than a laborer, to procure from his own government the certificate required by said section, before he can be admitted into the United States?

Confessedly the petitioners are "Chinese persons," and are therefore within the letter of the statute. But in my judgment they are not the "persons" contemplated by Congress in the passage of the act.

Chinese women are not teachers, students, or merchants, and therefore they cannot, as such, obtain the certificate necessary to show they belong to the favored class. But as the wives and children of "teachers, students, and merchants," they do in fact belong to such class; and the proof of such relation with a person of this class, entitled to admission, is plenary evidence of such fact.

It ought not to be lightly or without cogent reason concluded, that Congress, in the passage of the act of 1884, professedly "to execute" the treaty of 1880, really intended to limit or restrain its operation in this respect. The treaty (Art. 2) declares that a Chinese merchant may bring his "body and household servants" with him into the country, and they "shall be accorded all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nations."

It is impossible to believe that parties to this treaty, which permits the servants of a merchant to enter the country with him, ever contemplated the exclusion of his wife and children. And the reason why they are not expressly mentioned as entitled to such admission is found in the fact that the domicile of the wife and children is that of the husband and father; and that the concessions to the merchant of the right to enter the United States and dwell therein at pleasure, fairly construed, does

include his wife and minor children; particularly when it is remembered that such concession is accompanied with a declaration to the effect that in such entry and sojourn in the country, he shall be entitled to all the rights and privileges of a subject of Great Britain or a citizen of France.

There is nothing in the act of 1884 that indicates an intention on the part of Congress to limit or restrain the privileges conceded to Chinese merchants by this article of the treaty. It only adds a rule or measure of evidence by which the fact of being such merchants may be conclusively established.

In the Matter of Tung Yeong, 11 Sawy. 620, Judge HOFFMAN held that the minor children of Chinese merchants were entitled to admission into the country, either with the father, or on being sent for by him, on the ground that they were not laborers, and said: "It is not without satisfaction that I found there was no requirement of the law which would oblige me to deny to a parent the custody of his child, and to send the latter back across the ocean from which he came."

It is true, this decision was made in February, 1884, while the act requiring the production of a certificate from "every Chinese person" seeking to enter the United States was not passed until July 5, 1884, and therefore it is not authority on the question of whether the words, "every Chinese person," in section 6 of the act, are limited to teachers, students, and merchants, and do not include their wives and children. But it is direct authority in favor of the conclusion that the children of a Chinese merchant, under article 2 of the treaty of 1880, are entitled to admission into the United States with their father or after him; and if a child, why not his wife?

My conclusion is, that under the treaty and statute taken together, a Chinese merchant, who is entitled to come into and dwell in the United States, is thereby entitled to bring with him and have with him, his wife and children. The company of the one and the care and custody of the other are his by natural right, and he ought not to be deprived of either, unless the intention of Congress to do so is clear and unmistakable.

The petitioners are illegally restrained of their liberty and are entitled to be discharged from custody, and it is so ordered.

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Points decided.

UNITED STATES v. HENRY CURTNER ET AL.

CIRCUIT COURT, NORTHERN DISTRICT OF CALIFORNIA.

FEBRUARY 4, 1889.

1. **PUBLIC LANDS—GRANT TO RAILROAD COMPANY.**—The congressional acts of 1862 and 1864, granting aid to the Central Pacific Railroad Company in the construction of a railroad and telegraph line to the Pacific Ocean, etc., operated as a present grant of land to the railroad company, upon conditions subsequent, which could only be defeated by breach of conditions, and divestiture of title thereupon, by proper proceedings on behalf of the United States.
2. **IDEM—LANDS GRANTED.**—The lands granted were the odd-numbered sections within twenty miles of the line of the road, such as were public lands at the date of the act, not sold, reserved, or otherwise disposed of by the United States, and such odd-numbered sections within the same limits as were public lands, to which a pre-emption or homestead claim had not attached at the time the line of the road was definitely fixed.
3. **IDEM—CONCLUSIVENESS OF GRANT.**—No right other than that of the railroad company could be acquired or initiated in any of said odd sections of land, after the filing in the local land office of the district, on January 30, 1865, of the order of withdrawal provided for in section 7 of the act of July 1, 1862.
4. **IDEM—FILING MAP OF ROUTE.**—The filing of the map of the general route, and the withdrawal thereupon, protected the lands against the acquisition of any other right by any other parties until the line should become "definitely fixed," when the grant became specific by attaching itself to every odd section within the prescribed limits.
5. **IDEM—STATE SELECTIONS OF LIEN LANDS.**—State selections of lien lands for school purposes made upon lands unsurveyed by the United States are utterly void.
6. **IDEM.**—All the state selections shown in the bill being upon lands unsurveyed by the United States at the date of selection, in townships 2 south, 1 east, and 3 south, 3 east, Mt. Diablo B. and M., were therefore void.
7. **IDEM—WHAT ARE SURVEYED LANDS.**—Lands are not surveyed lands by the United States until a certified copy of the official plat of survey has been filed in the local land office.
8. **IDEM—STATE SELECTIONS—VALIDITY.**—The state selections in question were also void, for the reason that the act of 1853, under which these selections were made, excepted from selection by the state in lien of school sections lost, "lands reserved by competent authority," and "lands claimed under any foreign grant or title," and "mineral lands."
9. **IDEM—PRIORITY OF GRANT.**—No right of any kind had attached to these lands when they were withdrawn for the purposes of the railroad grant on January 30, 1865, that, under the recent decision of the United States supreme court, in *United States v. McLaughlin*, could prevent that grant from attaching. It was, therefore, the first grant to attach, and by performance of the conditions subsequent, the title of the company became absolute.
10. **IDEM—LANDS EXCEPTED FROM CONFIRMATION.**—The selections in question were excepted from confirmation by the act of 1866; but had it been otherwise, it was not in the power of Congress at that time to divest the right of the company.
11. **IDEM—CONFIRMATORY ACT OF MARCH 1, 1877—EFFECT.**—The act of March 1, 1877 (19 Stats. 267), for like reasons, cannot affect the rights of the railroad company. At the date of this confirmatory act, seven years after the title of this company became perfect, the United States had no interest whatever in the land upon which the act could operate.

Opinion of the Court—Sawyer, C. J.

[February.]

12. **IDEM—SALE TO THIRD PERSONS—NOTICE.**—Parties purchasing under state locations in township 2 south, 1 east, since June 10, 1865, had official record notice of the right of the railroad company; for the map filed in the office of the register of the local land office had distinctly indorsed upon it in red ink the following, viz.: "The odd-numbered sections on this plat are granted to the Western Pacific Railroad."
13. **LIMITATION OF ACTIONS—RUNNING OF THE STATUTE.**—The statute of limitations does not run against the United States; and the cause of action here was not stale, the company having been, from the first, active in pursuing its right before the department of the interior.
14. **UNITED STATES CONTRACTS RELATING TO PUBLIC LANDS—ACTIONS.**—The government is not without interest in this action, being responsible to the company for the land or its full value, by reason of the statutory grant and contract in the congressional acts of 1862 and 1864.
15. **PUBLIC LANDS—MEXICAN GRANT.**—The Mexican grant called Las Pocitas was a float—a grant of two leagues within exterior boundaries embracing ten or more leagues, which two leagues so granted were confirmed and patented to the claimants, and the odd-numbered sections outside of the two leagues granted and confirmed, but inside of the exterior boundaries, passed to the railroad company.
16. **IDEM.**—The prior decision, in *Newhall v. Sanger*, 92 U. S. 761, by the United States supreme court, materially limited in its operation by the recent decision in *United States v. McLaughlin*.

Before FIELD, Circuit Justice, and SAWYER, Circuit Judge.

Mr. Benjamin Harris Brewster, U. S. Attorney-General, *Mr. S. G. Hilborn*, U. S. District Attorney, *Messrs. Shafter, Parker & Waterman*, and *Mr. J. W. Harding*, of counsel, for complainant.

Mr. H. F. Crane, *Mr. Mich. Mullany*, *Mr. L. D. Latimer*, *Mr. Thos. D. Carneal*, *Messrs. Rothschild & Baum*, and *Mr. J. C. Martin*, for respondents.

By the Court, SAWYER, Circuit Judge. This is a bill in equity, filed by the attorney-general on behalf of the United States, at the request of the secretary of the interior, to obtain a decree of the court *vacating and annulling the listing over to the state* of certain lands selected by the state, in lieu of sections 16 and 36, as was supposed, in pursuance of the act of Congress on the subject, adjudging such listing to be unauthorized and void, *annulling and vacating the patents issued to purchasers by the state, after such selecting and listing*, and decreeing that no title to the lands passed thereby to the patentees. The grounds of the bill are, that the listing over to the state was by mistake and without authority of law, the lands having been granted to the Central Pacific Railroad Company before any right could

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have attached in favor of the state, and were, therefore, not subject to selection by the state under the said acts. After a contest continued for many years, the secretary of the interior has finally decided that the lands in question belong to the railroad company, and that it is entitled to a patent; that they were listed to the state by mistake, without authority of law, and that the listing is void. But the department refuses to complicate matters by issuing patents. According to the view of the secretary of the interior, the United States are under obligation to convey a clear title to the railroad company, and they are unable to do so by reason of the mistake of the officers of the government, in unlawfully listing the lands to the state; and, consequently, that it is the duty of the government to have the prior listing to the state annulled, and the patents issued thereon declared to be unauthorized and void by a decree of the court, before issuing patents to the party entitled. For these reasons, and upon these grounds, this bill has been filed by the attorney-general, at the request of the secretary of the interior.

The lands in question are odd sections, lying within the twenty-mile limit of the grant of lands made to the Central Pacific Railroad Company, to aid in the construction of its road, by the act of Congress of July 1, 1862, and the act of 1864 amending said act. (12 Stats. 492, sec. 3, and 13 Stats. 358, sec. 4.) Part of the lands lie in township 3 south, range 3 east, Mt. Diablo base and meridian, and a part in township 2 south, range 1 east. The lands in township 3, range 3, were surveyed in the field in August, 1862, and sectionized, and a plat thereof was made and approved by the surveyor-general of California, December 24, 1862, but a duly certified copy of the plat was not filed in the land office of the district till June 4, 1869. The certified copy of the plat then filed is regarded by the department as the official plat, and the date of its filing, June 4, 1869, as the date of the survey. On *December* 28, 1865, a plat of the township, approved by the surveyor-general December 18, 1865, was filed in the district land office, but this plat is not regarded by the department as official, or as indicating the date of the official survey. Township 2 south, range 1 east, was first surveyed in the field in March, 1865,

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and an approved plat thereof first filed in the district land office June 10, 1865. In accordance with the provisions of said acts of 1862 and 1864, the railroad company filed in the department of the interior, on December 8, 1864, its map designating the general route of the road, and on December 23, 1864, the secretary of the interior, in pursuance of the provisions of said acts, issued an order withdrawing the said lands for the distance of twenty-five miles on each side of the line of said road so designated, "from sale, location, pre-emption, and homestead." A map, showing distinctly the lands so withdrawn, accompanied said order. Said order of withdrawal and map were received and filed in the district land office, and went into effect, at latest, on January 30, 1865. This action was before any of the lands in township 2, range 1, had been surveyed in the field, and before any plat recognized by the department as official, of the lands surveyed in township 3, range 3, had been filed, but after this latter township had been actually surveyed in the field. The road having been fully completed and accepted by the President, the railroad company filed its map of definite location on February 1, 1870. In 1839 the Mexican governor, Alvarado, made a grant of land called "Las Pocitas" to one Livermore and another, who presented it to the board of land commissioners for confirmation; and it was confirmed by the board, February 14, 1854. The decree is in the words following, to wit: "The lands of which confirmation are hereby made of 'Las Pocitas' are bounded and described as follows, to wit: On the north by the Lomas de las Cuevas, on the east by the Sierra de Buenos Ayres, on the south by the dividing line of the establishment of San Jose, and on the west by the rancho of Don Jose Dolores Pacheco, containing in all two square leagues, *a little more or less*. Reference for further description to be had to the map marked 'C,' and filed in the cause." The exterior boundaries contained from ten to twelve leagues. The district court, on appeal, affirmed the decree of the board, February 18, 1859, and the supreme court of the United States finally confirmed the grant on appeal in January, 1861.¹ The final decree of confirmation

¹ Not reported.

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is in the words following: "The land of which confirmation is hereby made is known as 'Las Pocitas,' and is bounded and described as follows, to wit: On the north by the Lomas de las Cuevas, on the east by the Sierra de Buenos Ayres, on the south by the dividing line of the establishment of San Jose, and on the west by the rancho of Don Jose Dolores Pacheco, *containing in all two square leagues, provided that quantity be contained within the boundaries named, and if less than that quantity be contained therein, then the less quantity is hereby confirmed.* Reference for further description to be had to the map marked 'C,' filed in this case."

After confirmation by the board and before the appeal, at the request of Livermore, then the owner of the grant, on April 5, 1854, William J. Lewis, a deputy-surveyor, was directed by the United States surveyor-general of California to make a survey. He was directed to notify any adjoining claimants who might be interested, of the time and place when any line would be run, to note any objections, and report any protest that might be made. He made the survey in accordance with the instructions, Livermore being present, and pointing out his corners and boundaries; and the deputy-surveyor reported that the owner, Livermore, "expressed himself entirely satisfied with the boundaries as I surveyed them, and as represented in the accompanying map." He reports that he has no doubt that "the survey as made fulfills the intentions of the Mexican grant, as derived from the terms of the grant." The neighboring owners were notified, and were also present with Livermore, and pointed out their boundaries; and they, as well as Livermore, were satisfied. This survey was approved by the surveyor-general June 19, 1854. It embraced over four—nearly five—square leagues of land, more than double the amount afterwards stated in the decree of confirmation by the supreme court, but did not include any of the lands now in controversy. An appeal having afterwards been taken by the United States from the decree of confirmation, nothing further was done under this survey. The final decree of confirmation by the supreme court in January, 1861, limited the amount to two square leagues, by striking out the words "more or less,"

in the decree of the board, and adding other words indicating the purpose; the language of the final decree being, "Containing in *all* two square leagues, provided that quantity is contained within the boundaries named," etc. In 1858, pending the appeal, Livermore died. The claim having been finally confirmed in 1861, Mr. Dyer, a deputy-surveyor, in 1865, under instructions dated September 21, 1865, made a survey, which embraced ten square leagues instead of two, to which the quantity was limited by the terms of the final decree. This survey embraced the entire Lewis survey, and extended far beyond it, in nearly all directions, and especially to the southeast and northwest. It also embraced the lands in controversy in this suit, at the two extremities of the survey, in the longest direction of the survey. The survey was approved by the surveyor-general of California on February 8, 1867. On July 30, 1868, the secretary of the interior set aside this survey as being "clearly wrong," and directed the commissioner to return it to the "surveyor-general, with instructions to reduce the quantity of land to two square leagues." A new survey was made by Dyer, deputy-surveyor, by which the land was reduced to two square leagues, all of which lies within the boundaries of the Lewis survey, but does not cover one half of that survey. None of the lands in controversy are within the two square leagues, or even within the boundaries of the Lewis survey. This last survey of two square leagues was approved by the surveyor-general May 11, 1870, by the commissioner of the general land office, March 1, 1871, and by the acting secretary of the interior on June 6, 1871, by which it became final. The land was patented in accordance with this survey, and the patent accepted by the claimant. Between May 15, 1863, and May 16, 1864, after actual survey in the field, but before the survey had been officially adopted or recognized by the secretary of the interior, and before it had been approved by the surveyor-general, and filed in the district land office, the state of California, by its locating agent, made selections and locations of all the lands now in controversy in township 3, range 3, in part satisfaction of the grant to the state, of lands in lieu of sections 16 and 36, under the act of March 3, 1853.

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10 Stats. 246, secs. 6, 7.) Between February 17, 1864, and February 9, 1866, the state had issued its certificates of purchase to the several purchasers thereof, the first payments of the purchase money having been made. The selections, apparently, at their respective dates, were by the register of the land office entered in his office. A portion of these lands were certified over to the state by the land department at Washington, approved by the secretary of the interior on November 15, 1871, and the remainder on March 24, 1873, and they were afterward patented to the purchasers by the state. The lands in controversy situate in said township 2, range 1, were selected in advance of any survey in the field by the United States surveyor-general, upon surveys made by the county surveyors of the state, between July 28, 1862, and July 20, 1863. Certificates of sale were issued to purchasers by the state for a part between March 2, 1863, and January 25, 1864, and for the remainder, between February 20, and March 14, 1865. These selections were entered by the register of the land office on June 12, 1865. A part was certified over to the state by the secretary of the interior on September 8, 1870, and the rest on March 11, 1871. These lands were also afterwards patented to the purchasers by the state. The listings over to the state were all after the final approval of the two-square-league survey of the rancho Las Pocitas, which was on June 6, 1871; also after the filing of the map of general route of the road by the railroad company in December, 1864, and the withdrawal by the secretary of the interior in January, 1865, as well as after the filing of the map of the definite location of the Western Pacific Railroad Company, on February 1, 1870. But the surveys and selections and issue of certificates of purchase by the state were before the said dates of June 6, 1871, and February 1, 1870. The Western Pacific Railroad was completed in accordance with the terms of the several acts of Congress relating to the subject on or before December 29, 1869, and the company thereby became entitled to the lands granted. A contest thereupon immediately arose before the department of the interior, between the railroad company and the settlers who settled subsequently to the grants on

the odd sections, as to what lands were included by the grant, and this was supposed to depend upon the exterior boundaries of the Las Pocitas grant. This matter was earnestly litigated before the department, a test case (*Arthur St. Clair v. The Western Pacific Railroad Company*), having been made by stipulation with the settlers, until January, 1874, when it was decided in favor of the railroad company. Soon thereafter, on May 12, 1874, the land agent of the company presented a list of lands for which the company claimed patents, including the lands in controversy, when it was discovered that the latter had been listed over to the state by mistake, upon the state selections hereinbefore referred to, as indemnity lands for losses of sections 16 and 36 granted for school purposes, and that they were claimed by purchasers from the state. The claim of the company for patents to these lands was vigorously prosecuted by the company, with varying results, until it was finally determined by the secretary of the interior, upon petition for reconsideration by the company, filed April 22, 1880, that the company was entitled to the lands; but he declined to complicate matters by issuing patents until the question of right should be settled by the courts. Thereupon, and for the purpose of having the question authoritatively adjudicated, upon his request the bill in this case was filed by the attorney-general on July 23, 1883. Upon the allegations of the bill, a demurrer was interposed, on the ground, among others, that the cause of action was barred by the statute of limitations; and if the statute of limitations does not run against the United States, then that the cause of action is stale, and it would be inequitable to enforce it at this late day. The demurrer was overruled, since the statute does not run against the United States, and the railroad company had, from the first, been active in pursuing its right before the department. The delay was entirely owing to the course of procedure in the department, and the large amount of other similar business incident to the administration of its affairs. (*United States v. Curtner*, 11 Sawy. 411.) Since the decision on the demurrer, the supreme court has decided the case of *United States v. Beebee*, 127 U. S. 338, in which it is held that, after a lapse of forty-five years, a suit in

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the name of the United States to cancel a patent obtained by fraud, and in which the United States has no interest, is barred, the suit being affected by the laches of those whose interests it asserts. The point is, therefore, now again made at the hearing, and this case is relied on as determining the question. We do not think it reaches the case. There has, certainly, been no laches here on the part of the railroad company. It has been pressing its claim earnestly before the department from the first, and it could not go any faster than the business and course of procedure of the department permitted. The company could not sue the government. Besides, we do not think the government is wholly without interest. If these lands are within the statutory grant, the company has earned them by a full performance of its part of the statutory contract, and an absolute indefeasible right to a patent, unencumbered by any cloud, has vested. The government, in that case, is legally bound to make a good title. It is legally liable to perform its part of the contract, and issue the patent as required by the statute. The United States are, therefore, responsible to the railroad company for the land, or its full value. By the mistake of their officers, they have put it out of their power to comply with their contract; and they are interested to the full value of the land in setting aside the listing and patents resulting from their mistakes, or having them judicially adjudged inoperative and void, in order that they may relieve themselves from their liability. For these reasons, we do not think the decision relied on reaches the case.

As we have seen from the facts stated, the lands in question are odd sections within the limits prescribed by the act of 1862, granting lands to aid the construction of the Central Pacific Railroad. The Mexican grant called Las Pocitas was a float—a grant of two leagues within exterior boundaries embracing ten or more leagues, unlocated both at the date of the act of 1862, and at the times when the claims of the state to the land in question were initiated. After the rights of both parties, whatever they were, had attached, this grant was finally located and patented so as to exclude the lands in controversy. There was then ample land to satisfy this float, both at the time of the

passage of the act of 1862, and at the time when the right of the railroad company attached to the particular odd sections, and became specific and indefeasible. In *United States v. McLaughlin*, 127 U. S. 428, decided at the last term of the supreme court, it was held, after the most mature consideration, that, in case of a floating Mexican grant of a specific quantity of land within large exterior bounds, the lands within such exterior boundaries are public lands, subject to a railroad grant, there being sufficient left to satisfy the float; and that the said act of 1862 took effect upon the odd sections of land within such exterior boundaries as were not finally required to satisfy the float, thus very materially limiting the operation of the prior decision in *Newhall v. Sanger*. That is precisely this case, and the same act of 1862 granted to the same company all the odd sections within the exterior boundaries of the Las Pocitas grant, embracing ten or more leagues within the prescribed limits and conditions not required to satisfy the float of two leagues, which has since been finally located so as to exclude the lands in question. Under this decision, then, the railroad company, by the acts of 1862 and 1864, had a valid grant to every odd section of land within twenty miles on each side of the road, and within the exterior bounds of the Las Pocitas grant, not embraced within the two leagues as it was finally located, "not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed." (12 Stats. 492, sec. 3.) The lands in question are odd sections within the prescribed limits, and are not embraced in the Las Pocitas grant as finally patented. These lands, therefore, upon completion of the road, passed to the railroad company, unless some one of the rights specified in the statute had attached before the attaching of the right of the company. Section 7 of the act provides that the "said company shall designate the general route of said road, as near as may be, and shall file a map of the same in the department of the interior, whereupon the secretary of the interior shall cause the lands within fifteen miles of said designated route or routes to be withdrawn from pre-emption, private entry, or sale." (12 Stats. 493.)

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This map of general location was filed in the office of the secretary of the interior on December 8, 1864, and on December 23, 1864, the secretary issued an order in pursuance of the acts of Congress, as they then were, withdrawing for twenty-five miles on each side of the designated line "from sale, location, pre-emption, and homestead," and forwarded it, together with a map showing the location and lands withdrawn, to the register of the land office of the district, embracing the lands, where it was received, filed, and promulgated, on January 30, 1865, from which date, at the latest, no right other than that of the railroad company could be acquired or initiated in any of said odd sections of land. If, then, no right of the kind specified by the statute had legally attached to the lands in question before the 30th of January, 1865, none could thereafter attach in favor of the state by selection, listing over by the land department, or otherwise, nor could Congress even authorize any subsequent legal transfer of title. The grant to the railroad company was a present grant upon conditions subsequent, which could only be defeated by breach of condition and its divestiture of title thereupon, by proper proceedings on behalf of the United States. The filing of the map of the general route, and withdrawal thereupon from sale, pre-emption, etc., protected the lands against the acquisition of any other right by any other parties until the line should become "definitely fixed," when the grant would become specific by attaching itself to every odd section within the prescribed limits, and could not thereafter be changed. (*United States v. McLaughlin*, 12 Sawy. 191, 202; *Buttz v. N. P. R. R. Co.* 119 U. S. 55; *S. P. R. R. Co. v. Orton*, 6 Sawy. 198, and cases there cited; *Denny v. Dodson*, 13 Sawy. 68; *Schulenberg v. Harriman*, 21 Wall. 44; *Missouri & R. A. Co. v. K. P. & T. R. Co.* 97 U. S. 491.)

The only remaining question, therefore, is, had any such right, as is excepted by the statute, legally attached in favor of the state in the lands in question, or any of them, on January 30, 1865? It is not pretended that any other right than that under the state selection had attached. It has been settled by numerous decisions in the state of California, and affirmed by the United States supreme court, that the state could acquire

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no right whatever by a selection of lieu lands made before the lands have been surveyed by the United States; and that a selection made upon unsurveyed lands is utterly void. (*Grogan v. Knight*, 27 Cal. 516; *C. P. R. R. Co. v. Robinson*, 49 Cal. 446, 448; *Chant v. Reynolds*, 49 Cal. 217; *Young v. Shinn*, 48 Cal. 26; *Hastings v. Devlin*, 40 Cal. 358; *Toland v. Mendell*, 38 Cal. 31, 41; *Aurrecoechea v. Sinclair*, 60 Cal. 549; *Collins v. Bartlett*, 44 Cal. 371, 380; *Smith v. Athern*, 34 Cal. 506; *Aurrecoechea v. Bangs*, 114 U. S. 383; *Bernard's Heirs v. Ashley's Heirs*, 18 How. 46.) None of the lands in question situate in township 2 south, range 1 east, as we have seen, were surveyed in the field by authority of the United States till the month of March, 1865, and the approved plats were not filed in the district land office till June 10, 1865. The applications of the state locating agent to locate all said lands in township 2 south, were made and entered in the office of the register of the land office on the 12th and 13th of June, 1865, the register having refused to recognize applications made in 1862 and 1863 upon surveys made under authority of the state. As we have seen, the acts of the state in making selections prior to the United States survey in March, 1865, and the filing of the plat in the land office in June, were utterly void, and no rights attached to the lands or any of them by virtue of those acts performed before said survey in March. On January 30th, at latest, the grant to the railroad company attached in such manner that it could not be thereafter limited or divested; and the absolute right to the lands by the completion of the road and filing the map of definite location indefeasibly vested in the company. There can be no doubt, therefore, that the complainants should have a decree that they are entitled to the lands in said township 2 south. The lands in question lying in township 3 south stand in no different situation from those in township 2 south, except that they were surveyed in the field by the United States deputy-surveyor in August, 1862, and a plat thereof was made and approved by the surveyor-general on December 24, 1862; but a certified copy was not filed in the office of the register of the land office of the district embracing the lands until June 4, 1869. This plat (so filed in 1869) is

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regarded by the interior department as official, and the survey as made of the date of filing. A plat approved by the surveyor-general, December 18, 1865, however, was filed in the district land office on December 28, 1865, this being the first plat filed in that office; but this map is not regarded by the interior department as official, as it had not at that time been approved and adopted by the department. Were it otherwise, this filing was too late. Unless the actual survey in the field, and making and approving a plat by the surveyor-general without filing it, or a certified copy of it, in the local land office, places the lands in the category of surveyed lands in contemplation of law, then these lands were also selected before they were surveyed by the United States, and the selections were void. The interior department did not regard the survey as official until the certified copy of the official plat was filed by direction of the department in the local land office, June 4, 1869. Whether this is to be regarded as the date of the survey or not, we are satisfied that the lands could not be regarded as legally surveyed in such sense as to open them to selection, location, sale, or other disposition till the approved copy of the plat was filed on December 28, 1865. This is the earliest date at which they could be considered open to selection, if open to selection then. The land office was the place for the disposition and record of the public lands; and until they had an authentic official plat of the surveys of the public land, it would be impracticable to keep a record of them, or of their disposition. If we are correct in this view, then no valid selection could be made, at the earliest, till December 28, 1865, and this was several months after the grant to the railroad company had indefeasibly attached.

On another ground the state selections in question are clearly void, and no interest attached to the lands selected in favor of the state. By the express terms of the act of 1853, under which the selections were made, "lands reserved by competent authority," "lands *claimed* under any foreign grant or title," and the "mineral lands," are excepted from the operation of the act. Consequently, neither such *reserved lands*, lands *claimed* under Mexican grants, nor *mineral lands*, could be legally selected in lieu of school sections lost, or otherwise disposed of. And this

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was manifestly the view of Congress, for when it passed the act of 1866, to quiet titles in California by confirming void selections, it also expressly excepted from confirmation "any land held or *claimed* under any valid Mexican or Spanish grant." (14 Stats. 218, sec. 1.) That selections of lands so claimed under Spanish grants were void, and created no right whatever in the state, is directly decided and settled by the supreme court of the United States in cases arising under this very grant, *Las Pocitas*, upon locations made in 1863, at the same time and in the same manner as the lands now in question were selected and located. (*Aurrecoechea v. Bangs*, 114 U. S. 382; *Huff v. Doyle*, 93 U. S. 558.) These cases are controlling. The lands were claimed under the *Las Pocitas* grant, at the time of their selection, location, and sale by the state, and they were afterwards in fact included in one of the surveys upon the final decree of confirmation; but that survey was set aside, and they were finally excluded by the survey which became final in the year 1871. The supreme court held that no valid selection could be made by the state until the grant was finally located. No right of any kind, then, had attached to these lands when they were withdrawn for the purposes of the railroad grant on January 30, 1865, that, under the recent decision of the supreme court in *United States v. McLaughlin*, could prevent that grant from attaching. It was, therefore, the first grant to attach, and by performance of the conditions subsequent, the title of the company became absolute. The selections in question were excepted from confirmation by the act of 1866; but had it been otherwise, as we have seen, it was not in the power of Congress, at that time, to divest the right of the company. The act of March 1, 1877 (19 Stats. 267), for like reasons, cannot affect the rights of the railroad company. The right of the company had not only attached, but by the performance of the required conditions within the prescribed time, and of the filing of the map of definite location, the grant had become specific on February 1, 1870, and the title of the company had become absolute and indefeasible. At the date of this confirmatory act, therefore, seven years afterwards, the United States had no rest whatever in the land upon which the act could operate.

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Points decided.

This case affords another instance of hardship arising from the ill-advised efforts of the state to prematurely select the lands to which it was entitled, without regard to the existing laws of the United States. But with respect to the particular lands now in question, the parties purchasing in township 2 south, 1 east, since June 10, 1865, had official record notice of the right of the railroad company, for the map filed in the office of the register of the land office had distinctly indorsed upon it, in red ink, the following: "The odd-numbered sections on this plat are granted to the Western Pacific Railroad. See letter of instructions dated December 23, 1864." It follows from these views that there must be a decree in favor of the United States, adjudging that the listing to the state of the lands in controversy was unauthorized and void, and that the patents issued by the state upon such listing to purchasers from her passed no title to them in the lands patented, and enjoining them from claiming, in any way or form, title to such lands, or to any part of them, under the said patents, and that the title to the lands passed to the Central Pacific Railroad Company by the acts of Congress of July 1, 1862, and of July 2, 1864, the said company having complied with the conditions of the grant to it, and constructed the road and telegraph line designated therein; and that the said company is entitled to a patent of the United States for such lands. No costs will be allowed to the complainants.

CHARLES E. BEACH v. UNITED STATES.

CIRCUIT COURT, NORTHERN DISTRICT OF CALIFORNIA.

JUNE 9, 1890.

1. REFUSAL OF WITNESS TO ANSWER QUESTIONS CRIMINATING HIMSELF NOT TO BE USED AGAINST DEFENDANT. — Where, upon the trial of an indictment, a witness for the government, under indictment for a similar offense, declined to answer the questions asked by the prosecution on the ground that his answers might criminate himself, and his refusal to answer was sustained by the court, it is error to allow the district attorney, against the protest of the defendant, to argue to the jury that this refusal was a circumstance to be considered by them in making up their verdict, as to whether it was not his real object to protect the defendant and not himself, and "that if he was thus particular to protect the defendant," it must have been from a knowledge that his answer might criminate the defendant and not himself.

Statement of Facts.

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2. REFUSAL TO CRIMINATE ONESELF, NOT TO BE USED AGAINST DEFENDANT IN CRIMINAL TRIALS. — It was error to refuse the following instruction: "The witness, Marks, is indicted for the same or a similar offense as defendant. He had a right to refuse to answer questions on the ground that it might tend to criminate himself. But this refusal on the part of Marks cannot be considered as evidence against Beach, nor can you consider it as a circumstance against Beach in making up your verdict.

Before FIELD, Circuit Justice, and SAWYER, Circuit Judge.

On writ of error from district court.

STATEMENT.

The plaintiff in error, Charles E. Beach, was indicted in the district court of the United States for the Northern District of California, for the crime of suborning certain persons named to commit perjury, in connection with entries of timber lands with the register of the land office in the district of California, in which the lands were situated, and was convicted and sentenced to three years' imprisonment at hard labor, and to pay a fine of two thousand dollars.

On the trial before the district court, one Marks was called as a witness by the government. He had also been indicted for a similar offense to the one for which Beach was on trial. He declined to answer several questions put to him, on the ground that his answers would criminate himself, and his refusal was sustained by the court. When the testimony was closed, the district attorney, in arguing the case to the jury, commented upon this refusal of the witness to answer. The bill of exceptions gives the following account of what he said, and of the rulings of the court thereon:—

The District Attorney. "Gentlemen, you have seen Mr. Marks on the stand in this case. He was called as a witness for the government. He is indicted for a similar offense as the defendant. You heard him refuse to answer my questions, upon the ground that it might criminate him; you have a right to consider whether or not he was trying to screen himself or to save Mr. Beach. The fact that Marks refused to answer these questions is a circumstance which you have a right to consider in this case. For making up your minds —"

Mr. Van Duzer (counsel of defendant, interrupting). "If

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your Honor please, the witness, Marks, is under indictment for the same offense as this defendant, and his trial is set down to immediately follow this one. He was called as a witness by the government and refused to answer, upon the ground that his answers might tend to criminate himself. We now object to the district attorney arguing to the jury that the refusal of Marks to answer questions under the circumstances stated is a circumstance which the jury have the right to consider in making up their verdict in this case."

The Court. "I shall not interrupt counsel. He has the right to comment on the refusal of Marks to answer questions upon the ground that it might criminate himself; it is for the jury to consider whether the refusal of Marks to answer was with the object of protecting himself or protecting the defendant."

Mr. Van Duzer. "We except to the ruling of the court in permitting the district attorney to comment in the manner he is doing on Marks' refusal to answer, or to say to the jury that this refusal of Marks to answer is a circumstance in this case which they may consider as against Beach."

The District Attorney (continuing). "I say, gentlemen, in making up your minds as to the guilt or innocence of the defendant, you have the right to consider whether or not Marks refused to answer these questions, not to save himself but to save Mr. Beach, the defendant. No answer that he could give to many of these questions could in any manner criminate himself, and you have a right to consider whether his real object was not to protect Mr. Beach and not himself, and when he was so particular to protect Mr. Beach, that it must have been from a knowledge that his answer might criminate not himself but the defendant."

The district attorney, against the protest and exception of defendant's counsel, being permitted so to do by the court, commented at great length on the refusal of Marks to answer questions as above stated, and read questions from the record which he had asked Marks, and which Marks declined to answer, on the ground above stated, and argued therefrom to the jury as follows:—

"Gentlemen, from the character of many of the questions pro-

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pounded and Marks' refusal to answer them, upon the ground that an answer might tend to criminate him, whether his real purpose was not to shield defendant is for you to judge, and whether he declined to answer many of the questions that in themselves could in no conceivable way inculcate him (Marks), it is for you to consider whether he did this for the purpose, as I have before said, of protecting himself or for the purpose of protecting Beach."

"To all of which the defendant objected, which objection the court overruled, to which ruling defendant duly excepted, and the district attorney proceeded in the same line of argument, subject to said objection."

When the court charged the jury, the counsel for the defendant, the plaintiff in error, requested the court to give the following instruction:—

"The witness, Marks, is indicted for the same, or a similar offense as defendant. He had a right to refuse to answer questions on the ground that it might tend to criminate himself; but this refusal on the part of Marks cannot be considered as evidence against Beach, nor can you consider it as a circumstance against Beach in making up your verdict."

The Court. "I refuse to give this. I am asked to tell you, gentlemen, that the witness, Marks, is indicted for the same offense as the defendant. He is indicted for a similar offense. I do not know whether the entrymen are the same or not. It is not material, though. He had a right to refuse to answer questions on the ground that the answering them might tend to criminate himself. Of course, he had that right; I allowed it to him. In numerous cases he availed himself of that right, and, I think, he refused to answer anything, although how it would tend to criminate himself was not apparent, nor, as the district attorney says, could he conjecture. The refusal on the part of Marks to answer cannot be considered as evidence against Beach. It is not evidence against him. It is a fact in the case, and the district attorney has the right, in my judgment, to argue to you that he refused to answer these questions, not to save himself, but to save Mr. Beach. Whether you agree to that is a question for you to consider. He has a right to argue on the

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character of the questions put, and the persistent refusal to answer anything, and from the fact that it was not apparent to any one, as he says, how the answers to the questions, or to some of them, could criminate him, that his real object was to protect Mr. Beach and not himself, and that when he was so particular to protect Mr. Beach it must have been from a knowledge that his answers might criminate him. It is a mere question of inference and argument. What the value of the argument is, I do not pretend to say. He has the right to argue it. In general terms, of course, it is not evidence against him. How can it be evidence against any one? The facts as they occurred in your presence, the district attorney has a right to comment upon. What inference should be drawn from it, and how important it is in determining the main issues in this case, I leave for you to decide. I shall not comment on it; I will give the instruction in that form. Of course, the witness has a right not to criminate himself, and of course that fact is not evidence against Mr. Beach, *except in the sense that I explained to you*, and which I hope I have made clear.”

An exception was then taken by the counsel of the defendant to this part of the charge.

The jury found the prisoner guilty, and he was sentenced as stated above. The case is brought before the circuit court on writ of error.

Mr. S. M. Buck, and *Mr. A. P. Van Duzer*, for plaintiff in error.

Mr. John T. Carey, for the United States.

By the Court, FIELD, Circuit Justice. We are clear that the court below erred in allowing the district attorney to argue to the jury that the refusal of Marks to answer certain questions, on the ground that his answers might criminate himself, was a circumstance to be considered by them in making up their verdict; that they had a right to consider whether it was not his real object to protect the defendant and not himself; and that “if he was thus particular to protect the defendant,” it must have been from a knowledge that his answers might criminate, not himself, but the defendant.

It was also error in the court, while stating generally to the jury that the refusal of Marks to answer could not be considered as evidence against the defendant, to accompany the statement with the charge that it was a fact in the case from which the district attorney had a right to argue, that the refusal was not to save himself, but to save the defendant; that he had a right to argue from the character of the questions put, and the persistent refusals of the witness to answer any of them, and from the fact that it was not apparent to any one how the answers to the questions, or to some of them, could criminate him; "that his real object was to protect Mr. Beach, and not himself, and that when he was so particular to protect Mr. Beach, it must have been from the knowledge that his answers might criminate him;" that this was a question of inference and argument; and that the inference to be drawn from it, and how important it was in determining the main issue in the case, was for the jury to decide.

The refusal of the witness to answer the questions if he thought his answers would criminate himself was his constitutional right, which the defendant could not control, and no inference should have been permitted to be drawn against the defendant because of the assertion by the witness of this right to protect himself. Marks was called by the government. If he had testified, his testimony might have been in favor of the defendant, though criminating himself. It might have entirely exonerated the defendant. To infer that the very opposite would have been, or might have been the effect of his testimony, had it been given, was unwarranted. The intimation even that any such inference was justifiable, as plainly is to be drawn from the charge of the court, and its permission to allow the district attorney to argue to that effect to the jury was calculated to work injustice to the defendant, and to lead the jury to yield to suggestions and suppositions rather than to the actual evidence in the case. It would indeed be strange doctrine that any one could be found guilty, or even that his guilt could be seriously debated, because another party called as a witness who had no relations, and was not a conspirator with him, or charged in the same indictment, had refused to testify

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in order to protect himself. There is neither reason nor authority for any such doctrine.

For these errors the judgment must be reversed, and the cause remanded for a new trial.

E. J. MURPHY v. EAST PORTLAND ET AL.

Circuit Court, District of Oregon.

JUNE 9, 1890.

1. **INDEBTEDNESS OF TOWNS.**—An ordinance of a municipal corporation which provides for the payment of money by the town, without providing the means wherewith to make such payment, creates an indebtedness against such corporation, within the meaning of section 5 of article 11 of the Constitution of the state.
2. **INJUNCTION OF LEGISLATIVE ACT.**—A court of equity will not enjoin a municipal corporation in the exercise of its legislative function, unless the proposed act is beyond the scope of its power, and its passage would work irreparable injury.
3. **MATTER IN DISPUTE—VALUE OF.**—In a suit by a tax-payer to enjoin the passage of an ordinance creating an indebtedness against the town on account of its alleged illegality, the matter in dispute is the sum of the taxes which the plaintiff would have to pay in discharge of said indebtedness; and it must appear with reasonable certainty from the facts stated in the bill that such taxes exceed in value the sum of two thousand dollars.

Before DEADY, District Judge.

Mr. Charles H. Carey, and Mr. Paul R. Deady, for plaintiff.

Mr. Alfred F. Sears, Jr., for defendants.

DEADY, J. This suit is brought by the plaintiff, a citizen of Washington, to enjoin the defendants, the municipal corporation of East Portland, the mayor and common council of the same, and the Oregon corporation, the East Side Water Company, from passing a certain ordinance, now pending before said council.

It is alleged in the bill that the plaintiff is the owner of a tract of land within the limits of the town of East Portland, assessed therein at five thousand six hundred dollars, upon which municipal taxes for the year 1890 were levied to the amount of forty-two dollars; that the act incorporating said

town provides "that no debt shall ever be created against the same exceeding in amount the sum of twenty-five thousand dollars" (Sess. Laws, 1885, p. 308), which amount is now incurred; that said town is authorized to levy taxes on the property therein for all purposes, at a rate not exceeding seventeen twentieths of one per centum; that there is now pending before said council an ordinance granting the defendant, the water company, the right to lay water pipes in the streets of the town, and furnish water to the inhabitants thereof, which also provides for the making of a contract between said town and said water company, whereby the latter is to furnish the former with water for public use, for ten years, at the rate of two hundred dollars a month, and for the purchase of said works by the town within ninety days after it is authorized so to do, by the legislative assembly, whereby an indebtedness will be created against said town exceeding the sum of two thousand five hundred dollars, for the payment of which the taxes levied on the plaintiff's property would exceed in amount the sum of twenty-five dollars, in satisfaction of which said property may be levied on and sold on the warrant of the town, as upon an execution.

The defendants' demur to the bill, objecting that the court has not jurisdiction of the subject of the suit.

On the hearing it was also assigned, as a cause of demurrer, that equity will not interfere to prevent legislative action by a municipal corporation.

It is admitted that the promise or undertaking provided for in the ordinance in question will, if formally made or entered into, create a debt against the town for the sum of twenty-four thousand dollars.

Section 5 of article 11 of the Constitution of the state provides: "Acts of the legislative assembly incorporating towns and cities shall restrict their powers of taxation, borrowing money, contracting debts, and loaning their credit."

In pursuance of this injunction, the power of the town to create a debt is limited by its charter to twenty-five thousand dollars, which amount is already incurred.

In *Salem Water Co. v. Salem*, 5 Or. 29, the supreme court of

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the state held that an agreement to pay the plaintiff eighteen hundred dollars a year for seventeen years, without any provision being made for the payment of the same as it became due, necessarily created a debt against the defendant, within the meaning of the constitution. It did not, however, decide what would be the effect if the ordinance authorizing the agreement also provided the means for the payment of such indebtedness, when and as it became due.

In *Coulson v. Portland*, 1 Deady, 481, I held that an ordinance whereby the defendant assumed the payment of the interest coupons, amounting to three hundred and fifty thousand dollars, of the bonds of the Oregon Central Railway Company, created a debt within the meaning of the constitution, although provision was made therein for the levy of taxes to pay such coupons, as they become due.

It appearing from the bill that the existing indebtedness of the town has reached the limit prescribed by its charter, the additional twenty-four thousand dollars contemplated by this ordinance, there being no provision made for its payment, is clearly illegal and void.

Whether the town could, under the restraint imposed on its power of taxation, by subdivision 2 of section 2 of its charter (Sess. Laws, p. 202), levy a tax sufficient to pay such indebtedness, as it become due, is a question. It could only be done under the levy for the "general fund," which is limited to one fourth of one per centum.

The authorities are not uniform on the question of the power of a court of equity to restrain a municipal corporation in the exercise of its legislative functions. The more modern, and I think the better doctrine is, that the court ought not to interfere by injunction with legislative action of a municipal corporation, unless the proposed legislation is beyond the scope of the corporate power, and its passage would, under the circumstance, work irreparable injury. After the passage of such an ordinance, its enforcement, if attended with such injury, may be enjoined. (*Coulson v. Portland*, 1 Deady, 492; *Spring Valley Water Works v. Bartlett*, 8 Sawy. 555; *Alpens v. San Francisco*, 12 Sawy. 631; 2 High on Injunctions, § 1243.)

In the abstract, the passage of this ordinance is not beyond the power of the town. By subdivision 7 of section 2 of its charter (Sess. Laws, 1887, p. 203), it is authorized, "to provide the city with good and wholesome water," and the cost of this scheme does not exceed the limit of indebtedness prescribed by the charter.

But owing to the existing state of its indebtedness, the town is, for the time being, prohibited, incapacitated, from passing any ordinance on any subject which will increase the same.

But I do not perceive how the mere passage of this ordinance can work irreparable injury to any one. It does not execute itself. Indeed it may never be passed. But if it is, and an attempt is made to enforce it, by entering into the contract with the water company, as provided therein, or by levying or collecting a tax to pay the indebtedness thereby created, any one so injured may have the officers charged with, or attempting such enforcement, enjoined.

Neither does it appear that "the matter in dispute" exceeds in value the sum of two thousand dollars.

It is true, it is so alleged in the bill, but the facts stated therein do not warrant the assertion.

For instance, it is stated that the additional and illegal taxes which the plaintiff will be compelled to pay on her property to meet the assessed expense of the proposed water supply, together with the purchase of "the water-works system," will exceed in ten years the sum of two thousand five hundred dollars. But the purchase of the plant of the water company is only *proposed* by the ordinance, and on the condition that the town shall receive the proper authority from the legislature; and then and in that event, the purchase will be valid.

"The matter in dispute" is the right of the town, by means of this ordinance, to create an indebtedness of twenty-four thousand dollars, payable in installments of two hundred dollars per month, and thereby subject the plaintiff's property to the payment of its share of the tax necessary for this purpose. And the *value* of such "matter," to the parties to the suit, is the value or amount of the taxes which would be levied on the plaintiff's property, in case the ordinance should be passed and enforced.

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The burden is on the plaintiff to allege and prove that these taxes would exceed in value the sum of two thousand dollars. Beyond the bare assertion that this "value" does exceed two thousand dollars, the bill is a blank on the subject. It appears that the property now pays for all taxes levied under the charter—for the "general fund," "street repairing," "fire purposes," "and payment of indebtedness"—the sum of forty-two dollars. In ten years this would amount to four hundred and twenty dollars. Would the water tax amount to more or less? On the facts stated in the bill no one can say. Such tax would have to be about five times the sum of all the taxes now levied on the property to give this court jurisdiction, on account of the value of the "matter in dispute." It is not at all probable that it would amount to so much. But be that as it may, it must appear, with reasonable certainty, from the facts stated in the bill, that the matter in dispute exceeds the value of two thousand dollars. And this "matter" is not the ordinance nor the property of the plaintiff, but the sum of the taxes which the plaintiff might have to pay on account of such property, by reason of such ordinance.

If it appeared from the bill what rate levied upon the property now on the assessment roll of the town would be necessary to raise this water tax, it would be a simple matter of calculation to ascertain how much of this tax the plaintiff would be required to pay. If one fourth of one per centum was the rate, the plaintiff would be required to pay fourteen dollars per annum, which would make the value of the matter in dispute in this suit not to exceed one hundred and forty dollars. And the strong probability is, that as the town increases in wealth and population, and real property increases in value, that the tax would diminish rather than increase.

The demurrer is sustained.

THE GIANT POWDER COMPANY v. THE OREGON PACIFIC
RAILWAY COMPANY ET AL.

CIRCUIT COURT, DISTRICT OF OREGON.

JUNE 16, 1890.

1. LIEN LAW OF 1885—STRUCTURE. — The general phrase in the act of 1885, “any other structure,” following, as it does, a specific enumeration of works declared to be subject to a lien for labor and materials furnished for their construction, such as a “building,” “ditch,” “flume,” and “tunnel,” held to include a railway.
2. LIEN ON RAILWAY—MAY BE LIMITED TO A SECTION. — A person entitled to a lien on a railway for materials furnished for its construction may in his notice of lien confine his claim to that portion or section of the road in the construction of which his material was used.
3. GIANT POWDER—MATERIAL. — Giant powder furnished by the manufacturer to a contractor for the construction of a railway, and used by the latter in the progress of such work, is “material,” within the purview of the lien law of 1885, for the value of which such manufacturer is entitled to a lien on the railway, or such portion thereof as the powder was used in the construction of.

Before DEADY, District Judge.

Mr. George H. Williams, for plaintiff.

Mr. L. Flinn, for defendants.

DEADY, J. This suit is brought by the Giant Powder Company, a corporation of California, against the Oregon Pacific Railway Company and the Wallamet Valley and Coast Railway Company, corporations of Oregon, and James Searle and E. B. Deane, doing business under the firm name of Searle and Deane, citizens of Oregon, to enforce a lien for material on a certain section of the Wallamet Valley and Coast Railway.

It is alleged in the bill that the defendant, the Wallamet Valley and Coast Railway Company, is the owner of said railway, which extends from Yaquina Bay, Oregon, eastward through Corvallis, into the Cascade Mountains; that, in 1888 and 1889, said company contracted with the defendant, the Oregon Pacific Railway Company, to construct said road eastward from Albany, Oregon; that on August 25, 1888, the Oregon Pacific Railway Company contracted with the defendants, Searle and Deane, to construct the portion of said road, commencing at station numbered 2659, plus 78, in Marion

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County, and extending from there eastward for fifteen miles along the established route of the same, in which contract it was provided that Searle and Deane should furnish all the material and labor for such construction; that Searle and Deane commenced work on the road on September 1, 1888, and completed said section thereof, according to the contract, on January 15, 1889, and there remained due them and unpaid thereon the sum of \$111,393.62.

That the plaintiff, between September 26 and December 31, 1888, furnished Searle and Deane "electrical material, powder, fuse, and caps, necessary and proper materials to use in the prosecution of said work," and the said defendants (S. and D.) agreed to pay the plaintiff the sum of \$7,148.82 therefor; that said material was used by Searle and Deane in the construction of said road, and the value thereof, namely, \$7,148.82, is now due from them to the plaintiff.

That on January 22, 1889, the plaintiff filed with the clerk of Marion County its claim for such material, under the lien law of Oregon, for the purpose of establishing a lien upon said section of said road, and the land for thirty feet on either side of the center line thereof, which claim was duly recorded; and that the plaintiff has obtained a judgment against Searle and Dean for said money, but nothing has been or can be made on the same.

The prayer of the bill is, that it be adjudged that the plaintiff has a lien on said section of the road for the amount due it for said material and costs of suit, including the cost of preparing such lien and a reasonable attorney fee, and that the property may be sold to satisfy the same.

The defendants, the railway companies, demur to the bill.

On the argument the following points were made in support of the demurrer: (1) At and prior to the filing of the alleged lien, the law of the state did not give a lien on railways to material men. (2) A lien cannot be had on a part or section of a railway. (3) The material in question did not enter into the construction of the road, but was merely used by the contractors as a part of their plant or means in performing their contract.

Section 1 of the act of February 11, 1885 (Comp. 1887, sec. 3669), provides that every person “furnishing material of any kind to be used in the construction . . . of any building, wharf, bridge, ditch, flume, tunnel, fence, machinery, or aqueduct, or any other structure or superstructure, shall have a lien upon the same for the . . . material furnished, at the instance of the owner of the building or other improvement or his agent; and every contractor . . . shall be held to be the agent of the owner for the purposes of this act.”

Section 5 of the act (Comp. 1887, sec. 3673) provides that any material man desiring to claim the benefit of the act must, within a certain time, “file with the county clerk of the county in which such building or other improvement, or some part thereof, shall be situated, a claim containing a true statement of his demand,” with the name of the owner of the property, and the person “to whom he furnished the materials; and also a description of the property to be charged with said lien, sufficient for identification.”

Section 12 of the act (Comp. 1887, sec. 3681) declares:—

“The words ‘building or other improvement,’ wherever the same are used in this act, shall be held to include and apply to any wharf, bridge, ditch, flume, tunnel, fence, machinery, aqueduct to create hydraulic power, or for mining or other purposes, and all other *structures and superstructures*, whenever the same can be made applicable thereto.”

By section 1 of the act of February 25, 1889 (Sess. Laws, 75), any subcontractor, material man, or laborer, who “shall furnish to any contractor, to any railroad corporation, any fuel; ties, materials, or supplies, or other article or thing, or who shall do or perform any work or labor for such contractor in conformity with any terms of any contract, express or implied, which such contractor may have made with any such railroad corporation, shall have a lien upon all property, real, personal, and mixed, of said railroad corporation.”

This is a most extraordinary act. The lien of the material man or laborer is declared to exist against all the property of the corporation, including “personal,” without limit, as to situation or place of existence, on the furnishing of materials or the

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performing of labor, without any record being made of the same, or notice to any one of the claim, except in the case of a laborer, when notice is required to be given to the corporation that he will hold its property for his "pay."

It is contended by counsel for the demurrer that the passage of the act of 1889 amounts to a legislative declaration that the act of 1885 did not include or apply to railways.

The subsequent act might have been passed out of abundance of caution, and not upon any well-grounded or serious impression that the former was wanting or insufficient in this respect. Be this as it may, the opinion of the legislative assembly of 1889, as to the scope and purpose of the act of 1885, is of very little moment, and can have no weight in the construction of the latter one, concerning rights and transactions which were vested or transpired before its existence.

The intention of the legislature of 1889, in passing the act of that year, is a proper subject of judicial inquiry and determination, but its opinion of the scope and effect of the act of 1885, if it had any, is not material in this case. Considering the peculiar provisions of the act of 1889, the most obvious reason for its passage is that the legislature thereby intended to take the subject of claims against railway corporations for materials and labor furnished out of the operation of the general lien law of 1885, and put it under this special act, which does not require any notice of the claim to be filed with any clerk or other officer, and provides a special proceeding in which all such claims must be enforced, as in one suit.

It must be admitted that if the legislature intended to include railways in the act of 1885, it is not apparent why so important a subject was not mentioned in the long list of those expressly named.

Still the language of the act is certainly broad and comprehensive enough to include a railway. It is certainly a "structure," if not a "superstructure." A lien can as conveniently be imposed upon it as upon a "ditch," "flume," or "tunnel." These instances of lienable property are expressly mentioned in the statute, and the scope and operation of this general term, "structure," immediately following this specific enumeration,

must be ascertained by reference to the latter. The doctrine of *noscitur a sociis* applies; and the significance of the word “structure,” in this statute, is indicated by the company it is found in—“ditch,” “flume,” and “tunnel.” If the language of the act was “building or other structure” only, then it might not be construed as including a railway. But the words, a “ditch or any other structure,” cannot consistently with this established rule of construction be held to exclude a railway. A railway is literally and technically a “structure.” It consists of the bed or foundation, which may be of earth, stone, or trestle-work, on which are laid the ties and rails. These taken together constitute a “structure” in the full sense of the word—a something joined together; built, constructed. (Freund’s *Lat. Lex. Structure, Struo*; Worcester’s *Dict. Structure*.)

In 2 Jones on Liens, section 1618, it is said that statutes giving a lien for labor and materials furnished for the construction of “buildings” are not usually regarded as being applicable to railways. But, he says (sec. 1624), where the term “structure,” “erection,” or “improvement” is used in the statute, it is possible to establish a lien for anything that can be attached to the realty; and cites, *Neilson v. Iowa Eastern Ry. Co.* 44 Iowa, 71, where it appears to have been held, under such a statute, that a lien existed against a railway for ties used in its construction.

In *Forbes v. Wallamet Falls Electric Co.* 19 Or. 61, it was held by the supreme court of this state, that poles set in the ground and connected together by wire in the usual way for the transmission of electricity between Portland and Oregon City, constitute a “structure” within the meaning of that term, as used in section 3669 (Comp. 1887), and therefore a lien attached thereto for work done thereon, at the instance of a contractor. In delivering the opinion of the court, Mr. Justice Strahan said: “Do these poles, planted in the ground, connected together with wires and insulators, constitute a structure, within the true intent and meaning of the statute? In answering this question, but little aid can be had from the decisions of other states; for the reason that no general principle of law is involved, and such decisions have generally turned on the special or peculiar phraseology of the particular statute.”

A railway is certainly a “structure” within the authority of this decision. The railway and the wireway, notwithstanding the different uses to which they are subject, are both structures, upon which a lien may be had as security for the labor and materials that entered into their composition.

The case of *Buncombe County v. Tommey*, 115 U. S. 122, cited on behalf of the demurrer, is not in point. It turned on the construction of a statute of North Carolina, that gave a lien on a “building . . . lot, farm, or vessel, or any kind of property not therein enumerated,” for “the payment of all debts contracted for work done on the same or material furnished.”

Of the specific terms used in this statute, only two—“building” and “vessel”—include structures; and they do not in the nature of things suggest or show that the following general phrase, “any kind of property,” was intended to include such a structure as a railway. On the contrary, it is manifest that the general term “property” has reference to, and is to be interpreted as a mere expansion of the specific kinds of “property” or land just mentioned—“lot” and “farm.”

The objection that a lien cannot be had on a part or section of a railway for labor or material furnished for its construction, does not strike me favorably.

In 2 Jones on Liens, section 1619, decisions to that effect are referred to, but they appear to have been made on the language of a statute giving a lien on “the road” as a whole; and also on the ground of public policy, which it is said will not permit a sale of a portion of a road on execution. It is easy to say a thing is against public policy. But that does not make it so. Public policy is manifested by public acts, legislative and judicial, and not private opinion, however eminent. I have no knowledge of any such public policy prevailing in this state. A railway is nothing but private property devoted to public use, the same as a warehouse, and is so far and no farther the subject of public policy. The owner, be he a natural person or a private corporation, can disuse or dispose of it, in whole or in part, at his or its pleasure.

True, it was held in *Brooks v. Burlington etc. Ry. Co.* 101

U. S. 443, that a person who furnished labor and materials used in the construction of a certain portion of a railway, had a lien on the whole of it. This ruling was made in favor of the lienor, and it does not follow from anything decided in that case, that he might not have limited his lien to the portion on which he bestowed his labor and materials, and enforced it accordingly.

But there is a public policy of this state, as shown by its legislation, that should be considered in this connection, which is, that persons who furnish labor or materials, to be used in the construction of railways, shall have a lien thereon, as a security for the value of such labor and materials. To promote this policy, and to produce the practical results intended by the legislature, the statute giving this lien should be construed, so far as in reason and right it may, and all mere doubts as to the extent and manner of its application should be so resolved.

The statute (Comp. 1887, sec. 3673) only requires the notice of the lien to be filed with the clerk of one county, that in which the "building or other improvement (structure), or some part thereof, shall be situated." That was done in this case. If the effect of the transaction is to give the plaintiff a lien on the whole road, it may sell the whole road. But my own judgment is, that even if the plaintiff might claim a lien on the whole road, it may, nevertheless, limit its lien by its notice to the part or section of the road for the construction of which it furnished material.

The notice also contains the name of the owner of the road and the persons to whom the plaintiff furnished the material, as provided in said section, and also a description of the property "to be charged with said lien, sufficient for identification," in these words: "The railroad known as the Wallamet Valley and Coast Railroad, being built by the Oregon Pacific Railroad Company, and being that portion of said railroad commencing at station No. 2659, plus 73, on the line of said road in Marion County, state of Oregon, and extending from there in an easterly direction a distance of fifteen miles along the surveyed and located route of said 'road in said' county and state, 'as shown by the maps . . . of the permanently located line of said railroad in the office of said company.'"

If there is no Wallamet Valley and Coast Railway in the state of Oregon, which passes through Marion County, then this alleged lien does not exist. But if there is, and I suppose of this fact there is no doubt, at least, on this demurrer, then the description given of it, and the section on which the plaintiff claims a lien, sufficiently identified it. A conveyance of a farm, said to be situate in Marion County, Oregon, belonging to the Oregon Pacific Railway Company, and known as "Black-acre," would be good, so far as description goes.

Was this material "used" in the construction of this section of this road within the meaning of this statute?

In *Basshor v. Baltimore & O. Ry. Co.* 65 Md. 99, cited by counsel for the demurrer, it was held, under a statute giving a lien on a bridge for all materials "used in or about" its construction, that a person furnishing a contractor with machinery wherewith to build a bridge, could not have such lien.

Admitting the correctness of this decision, as I do, the cases are not in my judgment parallel. The machinery and appliances furnished the contractor in that case, although "used" in the construction of the bridge, did not enter into the structure and become a part of it. They were the contractor's "plant," and retained their identity and fitness for further use, saving the limited and gradual wear and tear incident to such use.

This powder was not only "used" in the construction of this road, but it was thereby necessarily *consumed*; and it was so intended. It was furnished to be so used, in the construction of this road. Nice questions may arise as to whether material is "used" in the construction of a road, as a tool or plant simply, or so used and consumed as to entitle the furnisher to a lien on the result for its value.

The food furnished a contractor for his workmen may be said to be "used" and "consumed" in the construction of the road on which they work. But this is only so, in a remote and consequential way or sense. The food does not enter directly into the structure, and is not so used. Mason work may be done on a road in a dry country or season, when large quantities of water must be hauled many miles for the preparation of the necessary mortár. Upon the completion of the structure

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and the hardening of the mortar, the water has as thoroughly disappeared as the powder after the blast. Again, lumber may be used in the construction of a building for the purpose of scaffolding. However, it does not thereby literally enter into the composition of the building, nor, so to speak, become a part of it. But in my judgment, both it and the water have been "used" in the construction of the building and mason work within the meaning of the lien law and the purpose for which it was enacted.

And so I think this powder was "used" in the construction of this section of the road, whereby it was consumed, not gradually and incidentally, as a tool or part of a contractor's plant, but wholly and at once, in aiding to clear and fit the roadway for the reception of the ties and rails.

The demurrer is overruled.

THE SOUTHERN PACIFIC RAILROAD CO. v. WALTER R.
WIGGS AND SIMON NEWMAN.

CIRCUIT COURT, NORTHERN DISTRICT OF CALIFORNIA.

JUNE 23, 1890.

1. RAILROAD GRANT—INDEMNITY LANDS.—The act of Congress of July 27, 1866, granting lands to the Southern Pacific Railroad Company, was a grant of quantity; and the grantee, upon accepting the grant, filing its map of location and building, and equipping its road in the time and manner prescribed by the act, was entitled to its full complement of land to the amount of ten alternate sections per mile on each side of the road so constructed, provided the same could be found either within the specified present grant or indemnity limits.
2. DEFINITE MAP OF LOCATION—ORDER OF WITHDRAWAL—DEFINED LIMITS OF INDEMNITY BELT.—The Southern Pacific Railroad Company filed its map of definite location on the 3d of January, 1867, in the office of the commissioner of the general land office, showing the present granted and indemnity limits thereon, which granted and indemnity limits are clearly defined in the act of Congress; and the indemnity belt is particularly limited to specified boundaries outside of the granted limits. *Held*, that upon filing the map of definite location, and upon the secretary of the interior issuing his order withdrawing all the lands within forty miles of the line of the road, the odd-numbered sections both within the present granted and indemnity limits were withdrawn from pre-emption, homestead entry, or any other disposition by the general land office. Furthermore *held*, that the statute itself in terms provides that the odd sections shall not be liable to sale or entry or pre-emption other than to the company. Congress intended to withdraw from sale, entry, or pre-emption all those lands

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set apart within specifically defined limits, as well those authorized to be selected as lieu lands, as those absolutely granted, in which the title itself presently vested. The *right of selection* indefeasible by pre-emptioners vested upon filing the map of definite location and withdrawal, as provided by the statute, although the title to the land itself did not vest till the selection.

3. **AUTHORITY OF THE SECRETARY OF THE INTERIOR.** — The secretary of the interior had no authority, while a deficiency existed, to allow a pre-emption to be made upon an odd section within these indemnity limits. While such deficiency existed, the secretary could not throw open the odd sections within the indemnity limits to pre-emption or homestead entry. The right of selection, in the company, to these lands, is given in the statute itself, and the secretary cannot revoke it.
4. **JOINT RESOLUTION OF CONGRESS OF JUNE 28, 1870.** — This joint resolution conferred no new rights upon a pre-emptor going upon these lands subsequent to the order of withdrawal. It only saved, and reserved, such rights as he had already acquired before its passage.
5. **CLOUD UPON PLAINTIFF'S TITLE.** — A patent issued in the name of the United States to a pre-emptor, entering upon these lands subsequent to the order of withdrawal, is erroneously issued, without authority of law, and is void. The existence of such a patent is a cloud upon the complainant's title. It embarrasses the assertion of complainant's rights, and prevents it getting a patent to the same land to which it is entitled. These circumstances constitute ground for equitable relief. A patent so issued to a pre-emptor is void, and the using of it should be perpetually enjoined.
6. **DECISION OF SECRETARY OF INTERIOR NOT CONCLUSIVE UPON QUESTIONS OF LAW.** — Where the secretary of the interior, acting upon a known and recognized state of facts, draws therefrom an erroneous conclusion of law, and, in pursuance of such erroneous conclusions, issues a patent to a party not entitled thereto, his action is not conclusive, but is subject to review and reversal by the courts.

Before SAWYER, Circuit Judge.

Mr. Joseph D. Redding, for complainant.

Mr. Joseph H. Budd, for defendants.

STATEMENT OF FACTS.

This is a bill in equity seeking a decree declaring void and annulling a patent of the United States to a quarter section of land claimed by the complainant, as a part of the land granted to it to aid in the construction of its railroad under the act of Congress of July 27, 1866, found in fourteenth statute, 392. The land lies outside of the twenty-mile limit, and within the thirty-mile limit fixed by the statute, and being a portion of the land which the complainant was authorized to select to make up for any deficiency that might be found in the odd sections within the twenty-mile limit by reason of a prior disposition thereof, or the acquisition of prior rights therein.

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The complainant filed its map of definite location in the proper office on January 3, 1867, and a subsequent map on September 3, 1871, covering substantially the same lines. A letter of the secretary of the interior, accompanied by a plat showing the thirty-mile limit, withdrawing the lands from sale, entry, or pre-emption, and so forth, in accordance with the statute, within the said thirty-mile limit, was filed in the Stockton land office on May 3, 1867, which plat and withdrawal included the lands in question. This withdrawal does not appear to have ever been revoked, or attempted to be revoked, either by Congress or the interior department. The plat of the township embracing the land in dispute was filed in the proper land office on March 19, 1881.

On May 19, 1881, the respondent, Wiggs, filed in the said land office at Stockton, his pre-emption declaratory statement for the said land, claiming a settlement thereon on May 15, 1868, which date is more than a year after complainant filed its map of definite location. He made final proofs of said pre-emption on February 19, 1884, and received the patent therefor, now in question, on June 12, 1885. There was a contest in the land office from the beginning between the complainant and defendant, Wiggs, over the latter's right to pre-empt the land, which being decided in favor of respondent, was taken before the department at Washington on appeal; and in a decision rendered by the commissioner on January 28, 1882, respondent's right to pre-empt was affirmed.

This decision was affirmed by the secretary of the interior on November 27, 1883; and, in accordance with the determination of the secretary, the patent in question was issued to respondent on June 12, 1885. On July 9, 1885, the duly authorized agent of complainant, having selected the lands so far as it could make a selection, without the concurrence of the department, presented in the Stockton land office list No. 7 of lands selected by the Southern Pacific Railroad Company to make up deficiency, under and in pursuance of said statute of July 27, 1866, and tendered the full amount of fees receivable thereon, the full costs and expenses of survey having been paid, said list being in the usual form in use in such cases; and the register and receiver of said

land office rejected said list and selection, not on the ground that there was no deficiency, or of any irregularity in the form of proceeding, or in the selection, or that they were not otherwise subject to selection, but *for the reason that, as appears by the records of this office, said land was patented to Walter Wiggs, June 12, 1885.* This was the sole objection assigned. Said list of said selected land embraced the land in question. The said patent is the patent issued as hereinbefore stated.

The complainant had, before said selection, built and completed its line of road opposite and beyond the said lands within the time, and in all respects in the manner, as required by law, and it had been accepted by the proper officers of the government.

SAWYER, Circuit Judge (*after stating the facts*). Upon the facts stated, the question arises, whether the lands, under the statute, were open to pre-emption by the respondent, *at the time he settled upon them*, for the purpose of acquiring a pre-emption right, and whether the patent, upon fulfilling the other conditions, was lawfully issued to him; or whether, on the contrary, the complainant, by the acceptance of the land grant, filing its map of definite location and building the road in all respects in accordance with the requirements of the act of Congress, did not, from the date of filing its map of location, acquire a right indefeasible by pre-emption claimants under the existing laws, to select this land in lieu of lands within the twenty-mile limit, lost by reason of any of the causes enumerated in the statute. In *Ryan v. Central Pac. R. R. Co.* 5 Sawy. 261, affirmed in 99 U. S. 382, it was held that, in a similar grant, the grant attached and title vested to the specific alternate sections designated by odd numbers within the forty-mile limit of that grant, on the filing of the plat of the surveyed line of the road with the secretary of the interior, and the withdrawal of the land from sale by him; but that the title did not vest in any particular division of land that might be selected outside the limit to make up a deficiency until said deficiency had been ascertained, and the selection in lieu thereof had been actually made. This decision has been repeatedly recognized since.

It is insisted on the part of the respondent that these decisions must control the case, as the lands are in the belt of lands liable to be selected as lieu lands only, and were not selected to supply a deficiency till after the settlement for the purpose of pre-empting, at which time the title under the decision had not vested. But I am of the opinion, that those decisions are not broad enough to reach this case. The ultimate question in those cases was quite different. In this case, *the right to select, in the future, this land, in the part limited for that purpose, vested, should there turn out to be a deficiency, on filing the map of definite location, thereby fixing the limit of the district for selection, although no title to the land vested till selection.* The precise question now involved is not, so far as I am aware, presented in any other case. The statute itself makes a specific grant of every alternate section within certain specified limits, to which no other right has attached at the time when the line of the road becomes definitely fixed; and in case some of the lands are lost by reason of prior interests having attached, *it gives a right to select an amount equal to that so lost out of any odd sections of public lands free from other prior claims within other specified limits of no great extent. The right to select, at once, vests, though the title to specific lands does not, till selection is made.* And, to preserve that *right* of selection, the statute itself, in terms, provides, that said odd sections shall not be liable to sale, or entry, or pre-emption *other than to the company*; that no pre-emption right shall be allowed in those lands specified. The language of the statute is: "That there be and hereby is granted" to the railroad company . . . "every alternate section of public land not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line as said company may adopt through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever, on the line of the route, the United States have full title, and free from pre-emption or other claims or rights at the time the line of said road is designated by a plat thereof filed in the office of the commissioner of the general land office." And section 6 provides as follows: "And be it

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further enacted, that the President of the United States shall cause the lands to be surveyed for *forty* miles in width on both sides of the entire line of said road after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted *shall not be liable to sale or entry or pre-emption before or after they are surveyed, except by said company, as provided in this act*; but the provisions of the act of September, 1841, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled 'An act to secure homesteads to actual settlers on the public domain,' approved May 20, 1862, shall be and the same are hereon extended to *all other* lands on the said line of said road when surveyed, *excepting those hereby granted to said company.*" (14 Stats. 294, sec. 3, and 296, sec. 6.)

Thus, in express terms, it is provided, that the odd sections thus granted within the whole boundaries *shall not be subject to sale, entry, or pre-emption before, or after, they are surveyed, except by said company, as provided in this act.* It is apparent that Congress intended to preserve all these odd sections, within the space limited, till it could be ascertained what deficiency there would be; and the company could supply them by selections within the prescribed limits. It permitted sales and pre-emptions, within the prescribed limits, of even sections only. Congress intended that the grants should be substantial. This case affords an illustration of the injustice of any other view. This map of definite location was filed on January 3, 1867, whereby the limits became fixed, and the right of selection upon the arising of the conditions, vested. The government did not file its plat of the survey till March 17, 1881, fourteen years afterwards, and long after the completion of the road opposite the lands. Until this time it could not be ascertained whether any, or if any, what, deficiency would exist; and if it could be known, there could be no selection of odd sections to supply the deficiency until it could be known where the odd sections would fall, and this would require a survey. But if during all this time the lands were open to pre-emption, the lands could all be taken up, while the hands of the complainant were tied. In this very case the respondent initiated his pre-

emption claim by settlement in 1868, but did not, because he could not, file his declaratory statement till a short time after the filing of the plat in 1881, immediately after which the contest between him and the company, as to which had the right, commenced before the department, and it was followed up till finally decided, a short time before the patent issued. If one pre-emptor can enter upon the land wanted, and wait ten years or more for a survey, and thereby acquire a right, while the railroad company must wait for a survey before it can make its selection and acquire a right thereby, all the lands can be in that manner wrested from the company; and of what use to it, under such conditions, would be the right to select given by the statute?

If such a right of pre-emption exists, while the company cannot act, all the lands which derive their greatest value from the very construction of the road, or its contemplated construction, could be wrested from the company, even after the road is constructed, by a failure of the government to make the survey.

Manifestly, I think, Congress intended to withdraw from sale, entry, or pre-emption, by parties other than the company, all those lands set apart within fixed limits, as well those authorized to be selected as lieu lands, and thereby preserve the right of selection, till selection was possible to be made, as those absolutely granted in which the title itself presently vested. No time was limited by the act for selection, or limitation of time put upon the express withdrawal, either by the act or the secretary of the interior. A right to select which could be cut off at the sole discretion of any pre-emptor without any fault of the company, and without any power on its part to prevent it, would be illusory, and no right at all. By the statute the President was required to "cause the lands to be surveyed for *forty* miles in width,"—the *whole forty* miles. And the odd sections granted within the *whole forty* miles "shall not be liable to sale, entry, or pre-emption *before or after* they are surveyed, *except by said company*, as provided in this act." It does not appear to me that this language is susceptible of more than one construction, and that is, that *no*

pre-emption right could be *perfected or initiated* in the face of that prohibition till Congress sees fit to withdraw it, while still in its power to do so, or till the whole claim of the company for deficiency is both ascertained and satisfied. As Congress did not see fit to put any limitation upon the time for selection, neither the secretary of the interior, nor the courts, are authorized to prescribe such limitation.

In *United States v. Curtner*, ante, page 535, this court held, the circuit justice and circuit judge concurring, that, under a similar grant, no other right than that of the railroad company could be acquired or initiated in any of the odd sections within the limits of the grant, after the filing in the proper office of the map of the general route of the road, and the withdrawal of the lands by the secretary of the interior; that the filing of such map of the general route and the withdrawal protected the lands from the acquisition of any right by any other parties till the routes should be definitely fixed, when the title would definitely vest in the odd sections of the specific grant. It was, also, held, that no pre-emption right could be acquired, or even initiated, on any lands except those as to which such rights were expressly authorized by statute to be acquired, and *a fortiori* none can be acquired or initiated when there is, as in this case, an express statutory inhibition. In that case the lands were thus protected and withdrawn in a tract ten miles wider than was necessary for the grant after the line of the road became definitely fixed. The same rule was held with respect to pre-emption claims in *Southern Pac. R. R. Co. v. Orton*, 6 Sawy. 198; *Buttz v. Northern Pac. Ry. Co.* 119 U. S. 55; *Denny v. Dodson*, 13 Sawy. 68; *Schulenberg v. Harriman*, 21 Wall. 44; *Missouri K. & T. Ry. Co. v. Kansas Pac. R. R. Co.* 97 U. S. 491. The principles thus established in my judgment cover and control this case.

The joint resolution of Congress of June 28, 1870 (16 Stats. 382), "saving and reserving all the rights of actual settlers," conferred no new rights upon respondent. It only saved and reserved such rights as he had already acquired under prior laws before its passage. But he had acquired no rights under prior laws at that time to protect, as the land, as we have seen,

was not subject to pre-emption; and when he entered he was a mere trespasser against the express law of the land, and the rights of the complainant were in no wise limited by this resolution. Congress did not attempt to limit them, and it could not limit such rights as had already fully vested, had it desired to do so. (*Southern Pac. R. R. Co. v. Orton*, 6 Sawy. 197, et seq.)

The land, in the present case, was awarded by the department, and patented to respondent expressly upon the authority of a decision of the secretary of the interior rendered in 1878, before the decision in *Orton's Case*, cited. *Orton's Case*, and those cited in the opinion of the court, and especially those cases since decided by the supreme court and cited in the present opinion, established a rule wholly inconsistent with that adopted by the secretary of the interior relied on, and necessarily overruled it.

Although the selection of the lieu lands were to be "made under the *direction* of the secretary of the interior," they were to be "selected by said company," not by him; nor was the selection required to be *approved* by him, as is required by some other acts, and when there was a deficiency, and the company selected lands open to selection, there was no authority vested in the secretary to arbitrarily refuse to recognize and allow such selection. This would deprive the company of the right of selection expressly given by the statute, and vest it in the secretary, whereas the statute says in express terms, "other lands shall be selected by said company in lieu thereof."

It is urged that the matter of determining the rights of these parties was vested in the secretary, and that his action cannot be reviewed by the court, but is conclusive. I do not so read the decisions of the supreme court. There is no dispute about the facts here. The secretary acted upon a known and recognized state of facts, and on that state of facts drew an erroneous conclusion of law, and on those recognized facts gave the land to the respondent, whereas he should have awarded it to the complainant. He issued a patent to the respondent to land in which he had no legal right; a patent which, upon the known and recognized state of facts, he had no authority of law to issue.

It is urged, that if the claim of the complainant be estab-

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lished, it has the legal title, and an adequate and complete remedy at law, and that there is no ground for equitable relief or jurisdiction. But this patent is a cloud upon the complainant's title, which it is entitled to have removed. The existence of the patent gives color of title and is recognized by the land department. Its existence embarrasses the assertion of complainant's right, and prevents it from getting a patent to the same land, to which it is entitled. These circumstances constitute ground for equitable relief. The remedy at law is not equally adequate and complete. (*Van Wyck v. Knevals*, 106 U. S. 370; *Pixley v. Huggins*, 15 Cal. 128.)

Let there be a decree for complainant, in pursuance of the prayer of the bill, adjudging respondent's title to be void, and annulling it; that there be a perpetual injunction against his using it, or setting up any claim of title or right under it; and that he convey to the complainant any right he may have, or claim to have, under it.

STATE OF CALIFORNIA v. CHUE FAN.

CIRCUIT COURT, NORTHERN DISTRICT OF CALIFORNIA.

JUNE 23, 1890.

1. REMOVAL OF CAUSES—LOCAL PREJUDICE.—Under the Revised Statutes of the United States, section 641, providing for removal of a cause before final hearing, "when any civil suit or prosecution is commenced in any state court, for any cause whatever, against any person who is denied, or cannot enforce in the judicial tribunals of the state, . . . any right secured to him by any law providing for the equal civil rights of a citizen," a prosecution against a Chinaman for having in his possession a lottery ticket, under a law applying to "any person," cannot be removed on the ground of local prejudice or maladministration of the law.

Before SAWYER, Circuit Judge.

On motion to remand to state court.

Mr. John Lord Love,^o for motion.

Mr. Alfred Clarke, for defendant.

SAWYER, Circuit Judge. The defendant, a Chinese subject, was arrested upon a complaint filed in the police court of San Francisco, charging him with having in his possession a lottery

ticket, in violation of section 70 of ordinance No. 2187, making the act a misdemeanor. The section provides that "it shall be unlawful for *any person* to have in his possession . . . a lottery ticket," etc., and that "any person violating any of the provisions of this section shall be guilty of a misdemeanor," etc. The prisoner, upon being arrested, filed an elaborate petition, setting up numerous grounds intended to show why he could not obtain an equal protection of the laws in the state court, and asked that the case be removed to the United States circuit court for trial, in pursuance of the provisions of section 641 of the Revised Statutes of the United States; and the police judge having refused to allow the cause to be removed, he obtained a writ of *habeas corpus cum causa*, as provided in section 642, Revised Statutes, and the cause and the custody of the prisoner were transferred to the United States circuit court.

The state district attorney now moves, that the cause be remanded to the state court, and the custody of the prisoner restored to the sheriff of the city and county of San Francisco, on the ground, among others, that no sufficient case is made by the record and petition, under said provisions of the statute, for the removal.

That the statute is valid, and that a case properly coming within the provisions of the statute may be so legally removed, is settled by the decision of the supreme court, in the case of *Strauder v. West Virginia*, 100 U. S. 303, and other cases. The only question, then, is, whether the record and petition present a case within the purview of that statute. Upon careful examination, I am satisfied that the supreme court, in *Virginia v. Rives*, has settled the point, that it is not. This was a case of two negroes charged with murder, who allege, very fully, the facts, and that, on account of the action of the judges, and of popular prejudices, they were unable to obtain an equal protection of the laws. The case was removed to the circuit court under the provisions of section 641, Revised Statutes. In discussing the question arising on the petition, the supreme court makes the following observations, equally applicable to this case:—

"If the petition filed in the state court before trial, and duly verified by the oath of the defendants, exhibited a sufficient

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ground for a removal of the prosecutions into the circuit court of the United States, they were in legal effect thus removed, and the writs of habeas corpus were properly issued. All proceedings in the state court subsequent to the removals were *coram non judice* and absolutely void. This by virtue of the express declaration of section 641 of the Revised Statutes, which enacts that, 'upon the filing of such petition, all further proceedings in the state court shall cease, and shall not be resumed except as thereafter provided.' In *Gordon v. Longest*, 16 Peters, 97, it was ruled by this court that when an application to remove a cause (removable) is made in proper form, and no objection is made to the facts upon which it is founded, 'it is the duty of the state court to "proceed no further in the cause," and every step subsequently taken in the exercise of jurisdiction in the case, whether in the same court, or in the court of appeals, is *coram non judice*.' To the same effect is *Home Life Ins. Co. v. Dunn*, 19 Wall. 214. It is, therefore, a material inquiry whether the petition of the defendants set forth such facts as made a case for removal, and consequently arrested the jurisdiction of the state court, and transferred it to the federal court. Section 641 of the Revised Statutes provides for a removal 'when any civil suit or prosecution is commenced in any state court, for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the state, or in the part of the state where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States,' etc. It declares that such a case may be removed before trial or final hearing. Was the case of Lee and Burwell Reynolds such a one? Before examining their petition for removal, it is necessary to understand clearly the scope and meaning of this act of Congress. It rests upon the fourteenth amendment of the constitution and the legislation to enforce its provisions. The amendment declares that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction, the equal protection of

the laws. It was in pursuance of these constitutional provisions that the civil rights statutes were enacted. (Secs. 1977, 1978, Rev. Stats.) They enact that all persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other. Section 1978 enacts that all citizens of the United States shall have the same right in every state and territory as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property. The plain object of these statutes, as of the constitution which authorized them, was to place the colored race, in respect of civil rights, upon a level with whites. They made the rights and responsibilities, civil and criminal, of the two races exactly the same. The provisions of the fourteenth amendment of the constitution we have quoted all have reference to *state action exclusively, and not to any action of private individuals. It is the state* which is prohibited from denying to any person within its jurisdiction the equal protection of the laws, and consequently the statutes partially enumerating what civil rights colored men shall enjoy equally with white persons, founded as they are upon the amendment, are intended for protection against *state infringement* of those rights. Section 641 was also intended for their protection against *state action, and against that alone*. It is doubtless true, that a state may act through different agencies, either by its legislative, its executive, or its judicial authorities; and the prohibitions of the amendment extend to all action of the state denying equal protection of the laws, whether it be action by one of these agencies or by another. Congress, by virtue of the fifth section of the fourteenth amendment, may enforce the prohibitions whenever they are disregarded by either the legislative, the executive, or the judicial department of the state. The mode of enforcement is left to its discretion. *It may secure the right, that is, enforce its recognition, by removing the case from a state court in which it is denied into a federal court*

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where it will be acknowledged. Of this there can be no reasonable doubt. Removal of cases from state courts into courts of the United States has been an acknowledged mode of protecting rights ever since the foundation of the government. Its constitutionality has never been seriously doubted. *But it is still a question whether the remedy of removal of cases from state courts into the courts of the United States, given by section 641, applies to all cases in which equal protection of the laws may be denied to a defendant. And clearly it does not.* The constitutional amendment is broader than the provisions of that section. The statute authorizes a removal of the case only before trial, not after a trial has commenced. It does not, therefore, embrace many cases in which a colored man's right may be denied. It does not embrace a case in which a right may be denied by judicial action during the trial, or by a discrimination against him in the sentence. . . . But the violation of the constitutional provisions, when made by the judicial tribunals of a state, may be, and generally will be, after the trial has commenced. It is then, during or after the trial, that denials of a defendant's right by judicial tribunals occur. Not often until then. Nor can the defendant know until then that the equal protection of the laws will not be extended to him. Certainly until then he cannot affirm that it is denied, or that he cannot enforce it, in the judicial tribunals. It is obvious, therefore, that to such a case, that is, a judicial infraction of the constitutional inhibitions, after trial or final hearing has commenced, section 641 has no applicability. It was not intended to reach such cases. It left them to the revisory power of the higher courts of the state, and ultimately to the review of this court. We do not say that Congress could not have authorized the removal of such a case into the federal courts at any stage of its proceeding, whenever a ruling should be made in it denying the equal protection of the laws to the defendant. Upon that subject it is unnecessary to affirm anything. It is sufficient to say now that section 641 does not. It is evident, therefore, that the denial or inability to enforce in the judicial tribunals of a state, rights secured to a defendant by any law providing for the equal civil rights of all persons citizens of the United States,

of which section 641 speaks, is primarily, if not exclusively, a denial of such rights, or an inability to enforce them, resulting from the constitution or laws of the state, rather than a denial first made manifest at the trial of the case. In other words, the statute has *reference to a legislative denial, or an inability resulting from it*. Many such cases of denial might have been, . . . as they had been, denied a trial by jury. They have been excluded by law, from any jury summoned to try persons of their race, or the law might have denied to them the testimony of colored men in their favor, or process for summoning witnesses. Numerous other illustrations might be given. *In all such cases* a defendant can affirm, on oath, before trial, that he is denied the equal protection of the laws or equality of civil rights. *But, in the absence of constitutional or legislative impediments, he cannot swear before his case comes to trial that his enjoyment of all his civil rights is denied to him*. When he has only an apprehension that such rights will be withheld from him when his case shall come to trial, he cannot affirm that they are actually denied, or that he cannot enforce them. *Yet such an affirmation is essential to his right to remove his case*. By the express requirement of the statute, his petition must set forth the facts upon which he bases his claim to have his case removed, and not merely his belief that he cannot enforce his rights at a subsequent stage of the proceedings. The statute was not, therefore, intended as a corrective of errors or wrongs committed by judicial tribunals in the administration of the law at the trial.” (*Virginia v. Rives*, 100 U. S. 316, et seq.)

Thus the court held the case not to be within the statute, and issued a mandamus to the district judge directing him to remand it to the state court. That decision, in my judgment, completely covers this case. The Chinese stand exactly in the condition of those negroes with respect to a right to enjoy equal rights. Regarding the ordinance in question as a law of the state, or standing upon the same footing as a law of the state, it is perfectly fair and equal upon its face. It applies to “any person,” and “every person.” It is upon a proper subject for such municipal legislation. If there is a failure to execute it, or if it is unequally executed—if there is a discrimination

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against Chinese in its administration—that is not the fault of the ordinance. The ordinance gives no countenance to such action. The state does not thereby command or authorize this discrimination, but if it exists, as alleged, and a strong case of discrimination in practice is, certainly, alleged, this results from the wrongful unauthorized action, or non-action, of the courts, executive officers of the government, or other persons, precisely as in the case cited, and not from the commands, or authority of the state, or the provisions of the law itself. And for such wrongs, in the language of the supreme court, “section 641 has no applicability. It was not intended to reach such cases. It left them to the revisory power of the higher courts of the state, and ultimately to the review of this court.” (*Virginia v. Rives*, 100 U. S. 319.) In *Strauder v. West Virginia*, the discrimination was made by the statute of the state itself, and not in its execution. The statute authorized the wrong. In other words, the wrong was committed by the state, and the statute was void upon its face. On that ground the case was held to fall within the provisions of section 641, and it was properly removed, and the statute set aside. That is the difference between the two cases, bringing the one within the statute, while the other is not. The wrong in the one case is the direct necessary result of the provisions of the statute—of its necessary operation *proprio vigore*—while in the other, it results from the maladministration of the law. The former is removable, and the latter is not, under the provisions of section 641 of the Revised Statutes. *Yick Wo v. Hopkins*, 118 U. S. 356, does not reach this question. Congress had a choice of remedies for depriving persons of the equal rights to which they are entitled under the national constitution and laws. It might, perhaps, have extended the remedy provided in section 641 to the class of cases to which this belongs, as well as to that embracing *Strauder v. West Virginia*, but, in the opinion of the supreme court, it has not done so, but has left it to the ordinary remedy of review by the higher courts, and its judgment, and the decision cited, are controlling. The case must, therefore, be remanded, and the prisoner recommitted to the custody of the sheriff from which he was taken, and it is so ordered.

Points decided.

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R. F. McCONNAUGHY v. SYLVESTER PENNOYER ET AL.

CIRCUIT COURT, DISTRICT OF OREGON.

JULY 28, 1890.

1. **SUIT AGAINST A STATE.** — A suit by a citizen of California, to enjoin the persons constituting the board of land commissioners of the state of Oregon from selling certain swamp lands, claimed by the plaintiff, as forfeited to the state for non-compliance with a condition of a former sale of the same lands by the state, to the plaintiff's grantor, is not a suit against the state of Oregon, it appearing that the legislation under which the defendants claim the right to act is unconstitutional and void, because it impairs the obligation of the contract of the state with such grantor.
2. **CONTRACT FOR SALE OF SWAMP LANDS.** — An application for the purchase of swamp lands under section 3 of the act of October 26, 1870, for the selection and sale "of swamp lands," from the date of its receipt and filing by the land commissioner, constitutes a contract between the state and the applicant for the sale to the latter of the tract or tracts therein mentioned, with the right to the immediate possession thereof; and on the performance of the conditions subsequent of payment and reclamation, within the terms and requirements of said section, the applicant or his assigns is entitled to a patent therefor.
3. **STATUTES OF OCTOBER 18, 1878, AND FEBRUARY 16, 1887.** — Section 9 of the act of 1878 does not, when fairly construed, include an application for the purchase of swamp land under the act of 1870, when there is no default in the payment of the twenty per centum of the purchase price as provided in said act of 1870; but if it does include such a case then it is unconstitutional and void, as impairing the obligation of the contract of the state with the applicant, which gave him until ninety days after the publication of the notice of the filing of the map of such lands in the office of the clerk of the county in which they lie to make such payment; and section 1 of the act of 1887, which declares all certificates of sale of swamp lands void on which the twenty per centum of the purchase price was not paid prior to January 17, 1879, is, in the case where the twenty per centum was paid when due, according to the contract of sale, whether before or after said day in 1879, unconstitutional and void for the same reason.
4. **CLOUD ON TITLE.** — A resale and conveyance of a tract of swamp land under the act 1887, before sold by the state under the act of 1870, on the ground that it had reverted to the state for the failure to pay the twenty per centum of the purchase price within the time required by law, would cast a cloud on the title of the purchaser or his assignee under the act of 1870.
5. **MULTIPLICITY OF SUITS.** — The prevention of a multiplicity of suits is an acknowledged head of equity jurisdiction, and this suit is clearly maintainable on that ground.
6. **SUIT AGAINST A STATE.** — This is not a suit against the state of Oregon or its authorized agents or representatives, but against the defendants, claiming to act as such, but without authority of law. The cases of *In re Ayers*, 123 U. S. 443, and *Hans v. Louisiana*, 134 U. S. 1, considered and distinguished from this.

Before DEADY, District Judge.

Mr. Charles B. Bellinger, for plaintiff.*Mr. Earl C. Bronaugh*, for defendants.

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DEADY, J. By the act of March 12, 1860, Congress granted to the state of Oregon the swamp and overflowed lands within its border.

On October 26, 1870, the legislature passed an act “providing for the selection and sale” of such lands. (Sess. Laws, 54.)

By this act it was made the duty of the governor, as land commissioner, to select such lands by means of deputies, who were required to return their selections to the commissioner for examination. Upon the selections being made in any county the commissioner was required to make out, in duplicate, maps thereof, one copy of which was to be filed in the office of the clerk of such county, the date of which filing was to be certified by said clerk to the commissioner, and thereupon the latter was required to give notice of such selection and filing, by publication in a weekly paper published in the county for four successive weeks.

The act also directed the commissioner to sell such lands at a price not less than one dollar per acre in gold coin. Any citizen of the United States over twenty-one years of age might apply “for the purchase of any tract or tracts” of such lands by filing his application therefor with the commissioner, who shall indorse thereon the date of such filing, describing the same by the “survey,” or if no survey is made, then by fences, ditches, monuments, or other artificial or natural landmarks; and in case of adverse applicants for the same parcel of land, the commissioners *shall sell the same* to the person whose application is first filed.

Within ninety days from the date of the notice aforesaid, twenty per centum of the purchase money must be paid to the commissioner, who shall “issue to the applicant a receipt therefor.” The balance of said purchase money shall be paid and proof of reclamation made within ten years from said date, when a patent shall issue to the applicant; but in default of such proof and payment the land “shall revert to the state and the money paid thereon shall be forfeited.”

On October 18, 1878, the legislature passed an act providing for the selection, location, and sale of state lands, and the management and disposition of the proceeds arising therefrom,

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including swamp and overflowed lands, and the express repeal of sundry acts relating thereto, not including the act of 1870. (Sess. Laws, 41.)

By this act the governor was “appointed” land commissioner for the state, as he had been since 1862, by the act of October 15th of that year (Comp. 1874, p. 629), with power “to locate all the lands to which the state is entitled under the laws of the United States,” and the board of commissioners for the sale of school and university lands were authorized to sell the swamp and overflowed lands theretofore or thereafter “selected,” not exceeding 320 acres to any one person, at not less than one dollar per acre.

After providing at some length for the manner of applying for the purchase of swamp lands and the purchase and conveyance of the same, the act (sec. 9) declares as follows:—

“All applications for the purchase of swamp and overflowed lands . . . made previous to the passage of this act, which have not been regularly made in accordance with law, or which were regularly made, and the applicants have not fully complied with all the terms and requirements of the law under which they were made, including the payment of the twenty per centum of the purchase price, are hereby declared void and of no force or effect whatever.”

On February 16, 1887, the legislature passed an act, entitled, in part, “to declare void certain certificates of sale, and to forfeit certain lands” (Sess. Laws, 9), the first section of which declares as follows: “That all certificates of sale issued by the board of commissioners for the sale of school and university lands, and for the investment of the funds arising therefrom, for swamp or overflowed lands, on which the twenty per centum of the purchase price was not paid prior to January 17, 1879, are hereby declared void and of no force or effect whatever; and said board of commissioners is hereby authorized and directed to cancel said certificates of sale.” These certificates of sale are the receipts provided for in the act of 1870.

The date, January 17, 1879, mentioned in this section, is the date of the act of 1878, plus the ninety days which elapsed before it took effect. Section 7 of this act provides: “All

swamp or overflowed lands reverting to the state under the provisions of this act shall be sold as provided in the act of 1878, relating to swamp lands.”

This suit is brought by the plaintiff, a citizen of California, to restrain the defendants, citizens of Oregon, constituting the board of land commissioners of the state, from selling certain swamp lands claimed by the plaintiff as having reverted to the state under section 1 of the act of 1887.

The cause was heard on a demurrer to the bill.

From the latter it appears that prior to October 18, 1878, Henry C. Owen had regularly applied, in pursuance of the act of 1870, for the purchase of certain swamp lands, theretofore certified to the state by the secretary of the interior, as swamp and overflowed under said act of 1860, including those now here claimed by the plaintiff; that thereafter, on November 23, 1881, and on April 3, 1884, and prior to the expiration of the ninety days from the date of the public notice provided for in the act of 1870, the said Owen duly paid to the board of land commissioners the twenty per centum required by said act on 43,207.60 acres of said lands, situate in Lake County, Oregon; that about October 15, 1884, the plaintiff purchased said last-mentioned lands from Charles N. Felton, the grantee of Owen, and now occupies the same for hay and pasturage; and that he paid Felton for said lands the sum of \$30,000, and assumed to pay the state the remainder of the purchase price therefor when it becomes due; that said defendants, assuming to act as the board of land commissioners, and pretending that the certificates of sale issued to Owen are void, for the reason that the twenty per centum of the purchase price was not paid before January 17, 1879, have canceled the same, and have ordered said lands to be sold under the act of 1887, as reverted to the state, and have actually sold about 1,000 acres thereof.

It is also alleged in the bill, that the defendants are acting, in this matter without authority of law; that the act of 1887, in so far as it declares the certificates given on the sale of the lands claimed herein by the plaintiff, because the twenty per centum of the purchase was not paid prior to January 17, 1879, is void and of no effect, because it impairs the obligation of the contract

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with the state, under which the plaintiff claims, for the sale of these land, which are of the value of \$50,000.

The demurrer to the bill is in substance, that the suit is in effect one against the state, and therefore this court is without jurisdiction.

The question, is this a suit against the state, is the question in the case; and this involves the construction and validity of the state legislation on the subject.

If the legislation is invalid, under which the defendants assume to act, they do not represent the state. They are acting without its authority, without the authority of law, and are responsible for their acts as private individuals. On the other hand, if this legislation is valid they represent the state, and the suit, in substance and effect, is against the state. Such a suit is forbidden by the eleventh amendment to the constitution of the United States, which declares: "The judicial power of the United States shall not be construed to extend to any suit, in law or equity, commenced or prosecuted against one of the United States, by citizens of another state, or by citizens or subjects of any foreign state."

Fortunately, the law on this subject has been so carefully and explicitly laid down by the supreme court, in numerous cases, from *Osborne v. Bank of United States*, 9 Wheat. 738 (1824), down to *Poindexter v. Greenhow*, 114 U. S. 270; *Allen v. Baltimore & O. Ry. Co.* 114 U. S. 311 (1884); *Hagood v. Southern*, 117 U. S. 52 (1885); *In re Ayers*, 123 U. S. 443 (1887); that nothing remains for this court to do, but to state the same and follow it.

In *Cunningham v. Mason & Brunswick Ry. Co.* 109 U. S. 446, Mr. Justice Miller, after stating that "whenever it can be clearly seen that the state is an indispensable party to enable the court, according to the rules which govern its procedure, to grant the relief sought, it will refuse to take jurisdiction," proceeds to classify the cases in which jurisdiction has been maintained. One of these, the second, is "where an individual is sued in tort for some act injurious to another, in regard to person or property, to which his defense is, that he has acted under the order of the government."

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In this class of cases, he says, the defendant “is not sued as, or because he is, the officer of the government, but as an individual, and the court is not ousted of jurisdiction because he asserts authority as such officer. To make out his defense he must show that his authority was sufficient in law to protect him.”

In support of this proposition the justice cites a number of cases decided in that court, including the then recent case of *United States v. Lee*, 106 U. S. 186, in which the plaintiff below maintained an action to recover the possession of certain real property against persons claiming to occupy as the agent and under the authority of the United States, on the ground that the alleged authority, which consisted of a purchase at an alleged tax sale, was invalid.

In the able, and I think unanswerable, argument contained in the opinion of the supreme court by the late Mr. Justice Matthews, in *Poindexter Greenhow*, *supra*, the question is thoroughly considered, in the light of all authorities, and the jurisdiction of the court unqualifiedly maintained.

The case was briefly this: On March 30, 1871, the legislature of Virginia authorized the coupons of the funded debt of the state to be received in payment of taxes due thereto, and by subsequent legislation forbid their being so received.

The plaintiff in error and below regularly tendered the defendant, the collector of taxes, coupons in payment of his taxes, which were refused, and certain of his personal property was levied on for the same. The plaintiff then brought an action of detinue, in a court of Virginia, to recover his property, in which the defendant had judgment. From there the case was taken by a writ of error to the supreme court of the United States, where the judgment of the court below was reversed; and it was held that the legislation of Virginia forbidding these coupons to be received for taxes impaired the obligation of its contract with the plaintiff, and was therefore void; that as the plaintiff had paid his taxes by the tender of his coupons, the defendant had no authority of law to enforce other payment by the seizure of his property; that in so doing the defendant ceased to be an officer of the law, and became a

private wrong-doer, in which character he took and detained the property of the plaintiff.

In the course of the opinion (p. 288), it is said:—

“The *ratio decidendi* in this class of cases is very plain. A defendant sued as a wrong-doer, who seeks to substitute the state in his place, or to justify by the authority of the state, or to defend on the ground that the state has adopted his act and exonerated him, cannot rest on the bare assertion of his defense. He is bound to establish it. The state is a political corporate body, can act only through agents, and can command only by laws. It is necessary, therefore, for such a defendant, in order to complete his defense, to produce a law of the state which constitutes his commission as its agent, and a warrant for his act. This the defendant in the present case undertook to do. He relied on the act of January 26, 1882, requiring him to collect taxes in gold, silver, United States treasury notes, national bank currency, and nothing else, and thus forbidding his receipt of coupons in lieu of money. That, it is true, is a legislative act of the government of Virginia, but it is not a law of the state of Virginia. The state has passed no such law, for it cannot; and what it cannot do, it certainly, in contemplation of law, has not done. The constitution of the United States, and its own contract, both irrepealable by any such act on its part, are the law of Virginia; and that law made it the duty of the defendant to receive the coupons tendered in payment of taxes, and declared every step to enforce the tax, thereafter taken, to be without warrant of law, and therefore a wrong. He stands, then, stripped of his official character; and, confessing a personal violation of the plaintiff's rights, for which he must personally answer, he is without defense.”

Further on (p. 291), after stating the difference in this respect between the government of a state, its agents and the state itself, it is said:—

“This distinction is essential to the idea of constitutional government. To deny it or blot it out, obliterates the line of demarkation that separates constitutional government from absolutism, free self-government based on the sovereignty of the people from that despotism, whether of the one or the many,

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which enables the agent of the state to declare and decree that he is the state; to say *L'Etat c'est moi*. Of what avail are written constitutions whose bills of right for the security of individual liberty have been written, too often, with the blood of martyrs, shed upon the battle field and the scaffold, if their limitation and restraints upon power may be overpowered with impunity, by the very agencies appointed to guard, defend, and enforce them; and that, too, with the sacred authority of law, not only compelling obedience, but entitled to respect? And how else can these principles of individual liberty and right be maintained, if, when violated, the judicial tribunals are forbidden to visit penalties upon individual offenders, who are the instruments of wrong, whenever they interpose the shield of the state? The doctrine is not to be tolerated. The whole frame and scheme of the political institutions of this country, state and federal, protest against it. Their continued existence is not compatible with it. It is the doctrine of absolutism, pure, simple, and naked; and of communism, which is its twin; the double progeny of the same evil birth."

In *Allen v. Baltimore & O. Ry. Co. supra*, the court allowed a perpetual injunction against the auditor of public accounts and treasurer of the state of Virginia, to prevent the enforcement of a tax by the seizure and sale of the plaintiff's property, for which coupons of the bonds of the state had been duly tendered and refused.

These cases go upon the theory that proceedings to enjoin the seizure and sale of property, or for the recovery of the possession of the same when seized, to enforce the payment of a tax, for which a valid tender has been made, are defensive in their nature, in which the plaintiff does not seek to compel the state or its agent to do or perform any particular act, but to prevent or redress a wrong to his property, by a person acting professedly on behalf of the state, but without the authority of law.

And that is this case exactly. The defendants, a board of commissioners for the sale of swamp lands, are assuming to sell certain of such lands as the property of the state. The plaintiff claims the lands under a contract of purchase from the state, and asks to have the defendants enjoined from doing an unlaw-

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ful act, to his irreparable injury. The defendants claim that they are acting in obedience to an act of the legislature, which the plaintiff maintains is unconstitutional and void.

If the legislation, under which the defendants assume to act, is an act of the state of Oregon, then the defendants stand for and represent the state, which, although not a party on the record, is in substance and effect the real defendant, and therefore the suit is forbidden by the eleventh amendment, otherwise not.

And before proceeding to consider this question, it may be well to suggest, that in this matter the defendants are not acting as governor, secretary, and treasurer of the state, but simply as a board of commissioners for the sale of swamp lands belonging to the state.

The state constitution (Art. 5, sec. 8) constitutes these persons by their title of office, and during their continuance therein, “a board of commissioners for the sale of school and university lands,” and subsequently the legislature devolved on them the additional duty of disposing of the swamp lands.

A qualified applicant for the purchase of swamp lands under the act of 1870 had a contract with the state for the sale and conveyance to him of the land specified in his application, from the receipt and filing of the same, according to the terms and conditions mentioned in the act. (*McConnaughy v. Wiley*, 13 Sawy. 148.)

The transaction, as set forth in the statute, has all the elements of a contract of sale. The statute is a formal standing offer by the state of these lands for sale, on the terms therein mentioned, and an invitation to all qualified citizens of the United States to become purchasers thereof, by filing an application for some specific tract thereof with the board, and complying with the subsequent conditions of payment and reclamation.

The purchaser—the applicant—is entitled to enter into the possession of the land at once, and commence the work of reclamation and cultivation, and appropriate the products thereof to his own use. The application is a written acceptance of the offer of the state, in relation to the land described therein, and on the filing of the same, the minds of the seller and the pur-

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chaser—the state and the applicant—came together on the proposition, and thenceforth there was an agreement between them for the sale and purchase of that parcel of land, binding on each of them until released therefrom, by some substantial default of the other, not overlooked or excused. This contract, as soon as made—as soon as the acceptance of the offer of the state is filed—comes under the protection of that restraint on the power of the state, which prohibits it from passing any law “impairing the obligation of contracts.” (U. S. Const. Art. 1, sec. 10.)

The experience of a century and more has demonstrated that but for this wholesome restraint on the action of state legislatures, a contract with a state would be subject to modification or revision with every whim of public opinion or gust of popular passion.

Section 1 of the act of 1887 is assumed in the bill, as the legislation which impairs the obligation of this contract, and under which the defendants are wrongfully attempting to sell this land. It expressly avoids all sales of swamp land on which the twenty per centum was not paid prior to January 17, 1879. This is broad enough to include the purchase by Owen under which the defendant claims. But, as appears, the contract with Owen gave him ninety days after the publication of the notice, in which to make this payment. This period had not expired on January 17, 1879, and before it did expire the twenty per centum was duly paid and accepted by the board.

It appears that the legislature of 1887 undertook to annul this contract, and require the certificates given the purchaser to be canceled, on the ground that he had not complied with section 9 of the act of 1878, by paying the twenty per centum prior to January 17, 1879, the date when that act took effect.

But the act of 1878 fairly and reasonably construed did not require such payment to be so made. It declared void and of no effect applications where the purchaser had not fully complied with “the terms and requirements of the law,” under which they were made, “including the payment of the twenty per centum of the purchase price.”

Counsel for the defendants insists that this act must be con-

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strued, as requiring the payment of this twenty per centum, prior to January 17, 1879, even if the same was not then due according to the terms of the sale as stated in the act of 1870. If this be so, then the act is so far void, because it impairs the obligation of the contract of sale, whereby the purchaser was to have until ninety days after the publication of notice to make the payment in, without reference to when such publication should be made. The state had the right to make this publication whenever it was ready, and to compel the payment within ninety days thereafter, but it had no power to require or compel the payment sooner than this, and before it was due. This is a matter material to the purchaser. He ought not to be required to make this payment before it is due, and every moment of time which the law gives him to make the payment in, prolongs, by the so much, the expiration of the succeeding ten years, within which he may reclaim the land and pay the balance of the purchase price.

But I do not think the act of 1878 ought to be so construed, or that it will even bear such a construction. By its express terms, it does not include any case except where there is a default on the part of the purchaser. The failure to pay the twenty per centum is included in the failure to comply with the terms and requirements of the law generally. It is not the mere non-payment of this per centum by a given day that is to have the effect to make void the application or the purchase, but the failure to do so, when and as required by law, namely, within ninety days after the publication of the notice of filing the map. Any other construction of the section would not only be strained, but would impute to the legislature a purpose to impair the obligation of the contract of the state with the purchaser, which ought not to be done if it can be avoided.

Prior to the passage of the act of 1887, the act of 1878 was not regarded as affecting sales where there had been no default in the payment of the twenty per centum, or otherwise, on the part of the purchaser or his assigns.

In an opinion delivered by the board of land commissioners some years before the passage of the former act, entitled "In the matter of the application of H. C. Owen for a certificate of

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purchase of certain swamp lands," it was held that the act of 1878 does not apply to a case where the period prescribed by the act of 1870, for the payment of the twenty per centum, has not expired; and such I understand has been the uniform construction heretofore given to the act by the board.

The construction given to a statute by the executive or administrative officers of the government charged with its execution is entitled to respectful consideration, and ought not to be lightly overruled. (Endlich on Interpretation of Statutes, sec. 360; *United States v. Moore*, 95 U. S. 763; *Scanlan v. Childs*, 33 Wis. 666; *Westbrook v. Miller*, 56 Mich. 151.)

In conclusion, the act of 1878 does not authorize the board to treat this land as reverted to the state, because the twenty per centum of the purchase price was not paid before it took effect, and would be unconstitutional and void if it did. The per centum was duly paid and accepted by the board when it was due.

Section 1 of the act of 1887 is void and of no effect in the case of contracts like this, where this per centum was not due and payable prior to January 17, 1879.

This being so, the defendants are acting without the authority of law—without the authority of the state. They do not represent the state. The state is not a party to this suit, either on the record or in substance or effect, and therefore the court has jurisdiction of the same, as a suit between private persons, who are citizens of different states.

The plaintiff is entitled to a perpetual injunction against the defendants and for costs.

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DEADY, J. On the application of the defendants, a rehearing was allowed in this case.

On the argument, the case of *Hans v. Louisiana*, 134 U. S. 1, was cited by counsel for defendants, as a case not referred to, because not at hand, on the former hearing.

On examination the decision was found not to be at all in point, and it was so admitted by counsel.

Briefly, the case was this: A citizen of Louisiana sued the state to recover the amount of certain coupons annexed to the

bonds thereof. These bonds were issued in 1874, and by an amendment to the constitution of that year they were declared valid contracts between the state and the holders thereof; and by the constitution of 1879, payment of the same were repudiated. The eleventh amendment does not prohibit a suit in the national courts against a state by a citizen thereof, and the judicial power of the United States extends to all cases arising under the constitution or laws of the United States (Const. Art. 1, sec. 3), which jurisdiction is conferred upon the circuit courts by section 1 of the act of 1875. (18 Stats. 470.)

So the plaintiff brought his action against the state, as one arising under the constitution of the United States, which forbids a state to "pass a law impairing the obligation of contracts."

The case was a new one, the question involved never having been before the court. It was held that a suit arising under the constitution of the United States cannot be maintained against a state by a citizen thereof, without its consent.

This conclusion rests, in the opinion of the court, on the general doctrine that a state is not suable, except with its own consent, and therefore the grant of judicial power to the United States, though in language extending to *all* cases arising under the constitution thereof, must be construed as not including a case against a non-consenting state.

But Mr. Justice Bradley, who delivered the opinion of the court, in conclusion, took care to say (p. 20): "To avoid misapprehension it may be proper to add that, although the obligations of a state rest for their performance upon its honor and good faith, and cannot be made the subject of judicial cognizance unless the state consents to be sued, or comes itself into court; yet where property or rights are enjoyed under a grant or contract made by a state, they cannot wantonly be invaded. Whilst the state cannot be compelled by suit to perform its contracts, any attempt on its part to violate property or rights acquired under its contracts may be judicially resisted; and any law impairing the obligation of contracts under which such property or rights are held is void and powerless to affect their enjoyment." Now the case under consideration is clearly within this category. While the purchaser of this property

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may not be able to sue the state, to compel a specific performance of its contract, to convey the same to him when he is entitled thereto, on "reclamation" and payment of the balance of the purchase price, because a "state," in the language of the court, "cannot be compelled to *perform* its contracts;" yet the purchaser has already acquired an interest in this land under his contract with the state, and a right to the possession and enjoyment of the same in the mean time; and any attempt by the state or its agents to deprive him of such interest or right, or to impair the value of the same contrary to such contract, may be judicially resisted. And that is what the plaintiff seeks to do by this suit.

On the argument, counsel for the defendants endeavored to show that this case came within the ruling, *In re Ayers*, 123 U. S. 443.

But the cases are really just the antipodes of each other. The court, in that case, after stating the general rule as laid down in *Hagood v. Southern*, 117 U. S. 52, that a suit against the officers of a state to compel them *to do and perform* certain acts, which, when done and performed, constitute a performance of an alleged contract by such state, is a suit against the state, say (p. 502): "The converse of this proposition must be equally true, because it is contained in it; that is, a bill, the object of which is by injunction, indirectly, to compel the specific performance of the contract, by forbidding all those acts and doings which constitute breaches of the contract, must also, necessarily, be a suit against the state."

Now, the plaintiff in this case is not seeking, by this suit, to compel the performance, directly or indirectly, of any contract with the state.

On the sale of this land under the act of 1870, the purchaser or his assignee became entitled, on payment of the purchase price and proof of reclamation, within the time prescribed, to a conveyance from the state.

If this were a suit to compel the specific performance of so much of that contract as remains unperformed by the state, that is, the execution by these defendants of a conveyance of the land to the plaintiff, it would be a suit against the state, although not named in the record.

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A decree for the plaintiff in such a case would require the defendants to do and perform an act, which they could only do as the agents and representatives of the state; and therefore the court would be without jurisdiction.

By this suit the plaintiff is not seeking to compel the defendants to do or perform any act, but rather to prevent their doing an act, injurious to his right and interest in this property, without authority of law or the state, and contrary to its express contract.

If the legislature had authorized the defendants to cause suit to be brought against the purchasers under the act of 1870, to declare the contracts of sale void, for want of compliance with the conditions subsequent, and the plaintiff should bring a suit to enjoin the defendants from bringing any suit against him, alleging that he was not in default as to any of said conditions, the case would be parallel with *In re Ayers*, and the answer would be the same in each case—this is a suit against the defendants as agents and representatives of the state, to prevent the state from doing a lawful act, namely, to bring a suit to set aside a sale of its lands, which it claims have been forfeited, for want of compliance with the terms of the sale, and in which the plaintiff may allege and show a compliance with the contract, and thereby defeat the suit.

On the rehearing no question was made, but that the legislation under which the defendants are acting in making sales of the plaintiff's land is unconstitutional and void, and therefore furnishes no justification for their conduct.

On the hearing it was not seriously questioned that equity would grant the relief sought by the plaintiff in this case, if the suit was not one against the state, on the ground of preventing a cloud being cast on his title, and also of preventing a multiplicity of suits.

On this point counsel at the rehearing contented himself with saying that if the defendants were not authorized to sell this land, their deeds thereto would be void on their face, and therefore would not cast a cloud on anything.

But the case assumed by counsel is not this case by any means; for the invalidity of the defendants' deeds would not necessarily appear on their face, if at all.

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The defendants have the general and exclusive authority to dispose of the swamp lands of the state, including those which may have reverted thereto, for delinquency, under section 9 of the act of 1878. The plaintiff, to overcome the apparent legal title which the sale and conveyance of his land would vest in the defendants' grantee, would be obliged to resort to extrinsic evidence to show that this land had been duly bargained and sold to his grantor, and had not reverted to the state under section 9 of the act of 1878, and therefore the second sale was unauthorized and wrongful.

This constitutes a cloud on title within all the authorities; and particularly where, as in this case, the plaintiff's interest is equitable in its nature. (Pomeroy's Equity, secs. 1398, 1399; *Coulson v. Portland*, 1 Deady, 489.) And an injunction will issue to prevent acts which would create a cloud upon title under the same rules that control in a suit to remove such cloud. (Pomeroy's Equity, sec. 1345.)

The prevention of a multiplicity of suits is a recognized head of equity jurisdiction. (Pomeroy's Equity, sec. 243, et seq.)

The defendants are not now authorized to dispose of swamp land in larger quantities than 320 acres to any one person, and that may be sold outright and a conveyance made to the purchaser at once. The disposition of this large tract of land in this manner may involve at least 150 sales, to as many different persons. If such sales are allowed to be made, the plaintiff will be compelled, in the assertion and maintenance of his right, to bring a separate suit in equity against each of such purchasers, to quiet title or to charge him as a trustee of the legal title, for the benefit of the plaintiff, the owner of the equitable estate.

This presents a very strong case of a multiplicity of suits which may be prevented by this suit, in which the whole matter may be considered and determined at once, and thus save expense and delay to all persons concerned.

This suit is very properly brought in this court, independent of the diverse citizenship of the parties, as it turns altogether on federal questions, which must ultimately be settled by the judgment of the supreme court of the United States.

These questions are: (1) Does the legislation under which

Statement of Facts.

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the defendants are proceeding to sell the plaintiff's land impair the obligation of his contract with the state? and (2) is this a suit against the defendants as individual wrong-doers, claiming to represent the state but without authority therefrom, or against them as the authorized representatives of the state?

And my judgment still is, that said legislation does impair the obligation of the state's contract; and that this is not a suit against the defendants acting as the authorized agents and representatives of the state, but as individual wrong-doers, acting under an unconstitutional act of the legislature, which is not and cannot be a law of the state, and therefore is no justification for the conduct complained of

GEORGE H. FRANCOEUR v. OSCAR NEWHOUSE.

CIRCUIT COURT, NORTHERN DISTRICT OF CALIFORNIA.

AUGUST 6, 1890.

1. PUBLIC LANDS—RAILROAD GRANT—EXCEPTION—MINERAL LAND.—Where a grant to a railroad company excepts mineral land, the term "mineral land" means land known to be mineral land when the grant took effect, or which there was then satisfactory reason to believe to be such.
2. ADVERSE POSSESSION—GOVERNMENT TITLE.—Possession held in subordination to the title of the United States may be adverse as to another claimant.

Before SAWYER, Circuit Judge.

STATEMENT OF FACTS.

This is the same case, the decision in which, on demurrer, is reported in 40 Fed. Rep. 618, where the facts alleged in the complaint are stated.

Some three months before the commencement of the suit, for a consideration equal to the government price of agricultural land, the Central Pacific Railroad Company executed a quit-claim deed to plaintiff, in which they "do remise, release, and quit-claim to the said G. H. Francoeur, his heirs and assigns, all the right, title, and interest that the said company or the said trustees now have, or may hereafter acquire from the government of the United States, in and to" the premises in ques-

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tion, "reserving, however, all claim of the United States to the same as mineral land."

Mr. A. L. Hart, and Mr. Geo. H. Francoeur, for plaintiff.

Mr. J. M. Seawell, and Mr. J. B. Reinstein, for defendant.

SAWYER, Circuit Judge (*orally*). Gentlemen of the jury, I announce to you that I have prepared some special issues in addition to the general verdict, upon which I desire you to find. It may save future litigation. I will read them to you so that you will be prepared to appreciate what I have to say upon these points. The first is: "We, the jury in the above-entitled case, find for the" plaintiff or defendant, whichever it turns out to be. You will write in either "plaintiff" or "defendant," according as you find on all the issues in the case.

SPECIAL ISSUES.

The next one is: 1st. Was the land in question known to be mineral, or was there good reason to believe it was mineral, at the date of filing the map of general location of the route of the road, and the withdrawal of the lands by order of the secretary of the interior, on August 2, 1862?

2d. Was the land in question known to be mineral, or was there good reason to believe that it was mineral, at the time that the line of the road was definitely located in 1866?

3d. Is the land in question, in fact, mineral land?

4th. Had the defendant and his grantors been in the continuous, open, and notorious adverse possession of the premises in question, claiming to be in the rightful possession under the laws, and afterwards under a patent of the United States adverse to the claim of the plaintiff and his grantor, for a period of five years next before the commencement of this suit, on June 28, 1889?

Gentlemen, I will now proceed to state to you the law which governs this case, which is the province of the court to determine. You will take, and apply it as given to you by the court, whether it meets with your approbation or not. It will then be your province to find the disputed facts in the case, and

those issues you are to find, upon the testimony before you, either for the plaintiff or for the defendant, as the preponderance of proof in your judgment requires. It only requires a preponderance of proof. You are the exclusive judges of the testimony, and to you alone belongs the findings of the facts. You are to examine the testimony of each witness. You are the judges of the credibility of the witnesses. You are to consider the intrinsic character of the testimony, whether it is intrinsically probable or not. You will consider any circumstances which affect the credibility of the witnesses, and give the testimony of each witness such weight as you think it is entitled to receive, and render your verdict as the preponderance of the evidence appears to be in your minds.

The deed to the plaintiff from the Central Pacific Railroad Company is dated February 13, 1889, only two or three months before the commencement of this suit. The deed, it is true, is a quit-claim deed, but if the title to the premises in question was in the Central Pacific Railroad Company at that time, that deed conveyed the title to Francoeur, and in that case, if the title was in the Central Pacific Railroad Company and conveyed to Francoeur, there must be a verdict for the plaintiff on that issue, and the plaintiff will be entitled to recover unless the other defense of the bar, by the statute of limitations, is found in favor of the defendant, in which case, of course, that will control.

The first great question to determine is, was the title in the Central Pacific Railroad Company at the date of that deed? If it was, it must have passed under the act of 1862, granting lands to aid in the construction of the Central Pacific Railroad Company, and if the title vested under that act, then the United States had nothing left in it, and it could afterwards convey no title by patent to the defendant in this case.

The act of 1862 granted all sections numbered with odd numbers within a space of ten miles on each side of the road to the Central Pacific Railroad, to which other right had not attached at the date of the final definite location of the road, and mineral lands were excepted. If the land in question was mineral land within the meaning of that act, the title never

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passed to the Central Pacific Railroad, because it was not granted. It was excepted out of the grant. If it was not mineral land, and there is no claim that any of the other rights had attached, then of course the title passed to the Central Pacific Railroad Company; so it is important to inquire whether, at the time the right of the company specifically attached to this land, it was mineral land, within the meaning of this provision of the statute. If you should determine that it was mineral land, that ends the case, because the company had no title which it could convey to the plaintiff in this case, and he relies upon no other title.

The complaint alleges and shows, and all of the testimony shows, and there is none to the contrary, that these premises are *in fact* mineral land. They were worked for years and a large quantity of gold taken out of them. They are in fact now, and were at the commencement of this suit, according to their own allegations, mineral lands. If they were in fact mineral lands at the time of the commencement of this suit, they must necessarily have been in fact mineral lands in 1862, at the date of the passage of this act, and such lands as Congress designed to exclude or except from the operation of the grant, for the character of the lands in this particular has not changed; but it has been held by the courts that only those are to be regarded as mineral lands within the meaning of the act of Congress which were known to be mineral, or which there was satisfactory reason to believe were mineral at the time of the attaching of the right of the company to these particular lands.

As it has been stated in the language of the courts, the words "mineral land," as used in the act of Congress, mean land known to be mineral at the time the grant took effect, and attached to the specific land in question, or which there was satisfactory reason to believe were such at said time. Only such land as was known to be mineral, or which there was satisfactory reason to believe was mineral at the time the grant attached to the land, is excepted from the grant.

Gentlemen, you have the starting point that these premises were in fact mineral lands at that time. The question then arises, whether or not they were known, or there was sufficient

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reason to believe, at the time this grant attached—and that is when the line of the road became definitely fixed, according to my construction of the act—to be mineral land, or whether there was sufficient reason to believe they were mineral lands. Perhaps that is a little too restricted, because there may be mineral land on portions of land so apparent and obvious that any one seeing it would know it on sight, and yet no one may have been at that point to observe it at the time, yet, because no one happened to be there, if the fact of there being mineral land is so obvious that it would have been manifest to any one who inspected it, that I take to be mineral land within the meaning of this act. But it is sufficient for this case to take the other definition. For the purpose of this case, these lands were in fact mineral. The question is, were they known to be mineral within the meaning of the act, or was there good reason to believe they were mineral?

Gentlemen, you have heard the testimony on that point. There is testimony here tending to show that persons did visit them, saw this mine, and saw men at work on this very ledge as early as 1862, and earlier. That is a long time ago. Of course, you cannot expect to find very definite and precise testimony in regard to transactions that occurred so long ago, but you take that in connection with the fact that they were mineral, and take such other testimony as was presented to you, and give it such weight as you think it entitled to, for the purpose of determining whether it was known to be mineral, or there was good reason to believe at the time that it was mineral. All the testimony shows the land was good for nothing for agricultural purposes, and there was very little timber on this piece of land according to the testimony. So, if it was good for anything, it was, perhaps, good for mining purposes. You heard the testimony that they did not take it up, or if they did, and abandoned it, that they abandoned it because they were unable on account of the inaccessibility of the mine, and the want of funds, to proceed and work the mine.

In determining that question, this is to be taken into consideration. It does not appear that the Central Pacific Railroad Company ever made any claim to this particular piece of

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land. They filed a list upon a claim of other land surrounding it, and on parts of the same section, but omitted to file this, nor did they, so far as the testimony shows, file any independent or separate claim to it. The testimony shows also that it does not appear that the Central Pacific Railroad ever interfered with the parties who finally took up and mined there. It does not appear that they ever made any adverse claim. It does appear that they did not contest the application for patent even as late as 1885. When a person applies for a patent, the law requires that publication should be given so as to give plenty of time to advise the world of what is going on. The evidence shows affirmatively that the company took no steps to oppose the issuing of this patent, under which defendant claims, and within two or three months before the commencement of this suit, the company executed this deed to the plaintiff in this case, and took particular care to protect itself in the form of that deed.

The deed is that "they do remise, release, and quit-claim to the said G. H. Francoeur, and his heirs and assigns, all the right, title, and interest that said company or the said trustees now have, or may hereafter acquire from the government of the United States in and to the following described tracts of land." "Reserving, however, all claim of the United States to the same as mineral land." The small consideration of the deed with the vast amount of improvements upon it, and the fact that they only remise and release and quit-claim their right and title, and still protect themselves from any claims against the United States by this reservation, you are entitled to consider in connection with the other testimony as indicating the probability that the company itself did not consider that that was within the provision of the grant. That is not conclusive, but is a circumstance in connection with the other facts in the case that you are entitled to consider in determining the first question submitted, as to whether, in 1862, these were known mineral lands, or there was good reason to believe they were mineral lands. If they were in a known mineral belt also (and there is some testimony tending to show that they were), that would be an indication that there might be good reason to believe there

was a known mine here to those who saw the ledge. All these facts you will take into consideration. You will take into consideration, also, all of the contradictory testimony that you have heard from the defendants, and as the preponderance appears to be, find yes, or no, and annex your answer to that question.

The next question which you are called upon to answer is, "was the land in question known to be mineral, or was there good reason to believe that it was mineral, at the time that the line of the road was definitely located in 1866?" That is, four years afterwards. The remarks I made with reference to the first inquiry are also applicable to this inquiry. Then there is additional testimony here with reference to the actual taking up of this claim and prospecting it between those times.

The grant takes effect on the specific land from the time of the filing of the map of the definite location, or when no such map is filed from the time of the definite location in fact of the road. The map of general location was filed in 1862, but no map of definite location was filed until the completion of the road, so far as the evidence discloses. On the contrary, the allegations in the complaint are that the road was definitely located in 1866. There is no allegation that it was located earlier, and the presumption is that they allege it at the earliest day justified by the facts, and the jury are entitled to consider that that is the time when the road was definitely located, there being no allegation or averment that it was located on an earlier day, or you might say, the day before. Until that definite location, it could not be determined where the grant would fall, and to what land it would attach. When the definite location is filed, they cannot change it afterwards. Between the filing of the map of definite route and the general location there was a right to vary the line, because instead of being ten miles on each side of the road, there was fifteen miles withdrawn within which to swing, five miles on each side, to vary the line of the road and still retain their rights. At this time, in 1866, was the land in question known mineral land, or was there good reason to believe it to be mineral land? Take all the testimony in the case, and find on that issue as you think the preponderance of testimony is. There is consider-

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ably more testimony with reference to that than there was in regard to the prior date—1862.

Is the land in question *in fact* mineral land?

Upon that issue there is no conflict of testimony. It is alleged in the complaint itself that a gold mine was discovered as early as 1883, and the parties took it up, and took possession of it. The testimony all shows that it was worked for years, and large quantities of gold were taken out, so that there is no conflicting testimony in regard to that question. If you find that this was known mineral land, within the meaning of the act, or land that there was good reason to suppose to be mineral land at the time the grant attached, then it is within the exception of the grant, and you must find for the defendant. If you find that it was not known mineral land, and there was not good reason to believe it was mineral land at the date, 1862, you will find for the plaintiff on that issue. As to the second date, 1866, the same rule will apply. If you find it was known mineral land in 1866, the date when the road became definitely located, or there was good reason to believe it was mineral land, you will find for the defendant.

On the contrary, if you find that it was not known mineral land at that date, or there was not then good reason to believe it was, you will find for the plaintiff on that issue.

If you find for the plaintiff on those two issues, the title would be in favor of the plaintiff, and you would have to find a general verdict in favor of the plaintiff, unless the defendant establishes the defense of the statute of limitations. The defendant has set up the statute of limitations. The law of California is, that if a person has been in the actual, notorious, adverse possession of land for a period of five years, the right of action of the real owner is barred, and the title as to him becomes effectually vested in the defendants.

This suit was brought, and the complaint was filed on June 28, 1889. The statute of limitations, therefore, began to run on June 28, 1884. If from 1884, or prior thereto, this defendant and his grantors were in the actual, adverse possession of these premises continuously until the commencement of this suit in 1889, then the bar of the statute attached, the plaintiff

cannot recover, and your verdict in that case will be for the defendant. If he was not in such continuous adverse possession, your verdict on that issue will be for the plaintiff.

If your verdict on all the issues is in favor of the plaintiff, then you must find for the plaintiff, but if you find for the defendant on either one of these issues, except the third, your general verdict must be for the defendant, and you must answer these questions accordingly.

What is an adverse possession? There is testimony tending to show that as early as 1882 or 1883 parties went on this land, took actual possession of this mine, and continued to work it continuously down to the commencement of this suit. Those who first took up the mine took up, as the evidence shows, fifteen hundred feet by three hundred or six hundred, I forget which, and conveyed to their successors in interest by those metes and bounds. The grantees went into possession, and finally conveyed to the Eagle Mining Company. Then that company went into possession. There is testimony tending to show that they worked continuously on that claim, expended a large amount of money, away up towards the hundred thousands in improvements in and about the mine, and continuously worked down to the commencement of this suit. If they did, they actually took possession of a portion of that land, and worked on it, claiming title to the full boundaries, and continued in possession; that is, possession of the whole, within the meaning of the law. They are not limited to the precise portion upon which they stood and worked. No one else appears by the testimony to have interfered. There is no testimony that the Central Pacific Railroad Company all this time made any claim to it at all, and the fact that the Central Pacific Railroad Company did not make any claim is no evidence that these parties held it under and by agreement with it. The testimony all tends to show that these parties held, claiming by their own right, first the mining claims as taken up and conveyed to them under the laws of the United States, and afterwards under the patent issued in pursuance of those laws of the United States upon such claim. I instruct you that the title for a portion of the time, unless granted to the railroad company, was in the

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United States. If it was in the United States, or believed to be in the United States, it does not prevent the operation of the statute of limitations, if the claim was adverse to the Central Pacific Railroad Company; at least, the most that can be said is, that the matter was doubtful as to where the title was, and there was a good foundation for claiming that this was mineral land, and excepted from the grant, so that a party could very well go in there in good faith, buy a claim, located by some one else, and under the laws of the United States continue his possession, claiming under that claim, present his claim for a patent to the United States, obtain it, and continue under it in good faith. On that question I will read you a passage from the decision in the case of *Hayes v. Martin*, 45 Cal. 563, which covers that exact ground: "It is not requisite that the party who relies on the statute should show that he claims his title in hostility to the United States." These parties did not claim in hostility, but went in under the laws of the United States, and finally got a patent. "He may admit the title in the United States, either with or without a claim on his part, or the right to acquire the title from the United States, and it is sufficient if he has such possession as is required by the statute, and claims in hostility to the title which the plaintiff establishes in the action." (*Hayes v. Martin*, 45 Cal. 563.) And this doctrine was repeated in *McManus v. O'Sullivan*, 48 Cal. 15.

These parties not only admitted the title of the United States, but claimed the right to enter under their laws, and they claimed a patent under those laws and got it. They claim in hostility, as far as the evidence shows, to the title of this complainant. The testimony tends to show that their possession commenced as early as 1882 or 1883, at the latest. The testimony also tends to show that the possession was continuous under these claims to a part, with a claim to the whole, according to the boundaries of their deed, down to the commencement of this suit.

If you find that to be a fact, the bar to the statute attaches, and you must find a general verdict for the defendant, and a verdict for the defendant under this last special issue submitted to you. If you find they did not, and were not in continuous possession adverse to this plaintiff during that time, and it was

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broken, they have failed to maintain the bar to the statute of limitations.

Gentlemen, this is all I think it necessary to say to you upon the subject. I hand to you the issues. The first one you will find for the plaintiff or defendant, as you find the case to be. If you find for the plaintiff, you must find in all the issues against the defendant, except the third. If you find on any one, except the third, against the plaintiff, you must find a general verdict for defendant. As to the others, you will answer yes or no, according as you find them to be.

The jury found for defendant, and answered each of the special issues in the affirmative.

UNITED STATES v. LAWRENCE SULLIVAN.

SAME v. WILLIAM SCOTT.

CIRCUIT COURT, DISTRICT OF OREGON.

OCTOBER 9, 1890.

1. BOARDING ARRIVING VESSEL.—Section 4606 of the Revised Statutes, providing for the punishment of any person who, without the consent of the master, goes on board an arriving vessel before she reaches her place of destination, and is moored thereat, applies to foreign vessels.

Before DEADY, District Judge.

Information for boarding vessel without consent of the master, before her arrival at the place of her destination.

Mr. Franklin P. Mays, and *Mr. Edward N. Deady*, for plaintiff.

Mr. Raleigh Stott, for defendants.

DEADY, J. The informations in these cases charge the defendants with the violation of section 4606 of the Revised Statutes, on August 24, 1890, by unlawfully going on board the vessel, *Kate F. Troop*, while she was in the Columbia River, near Astoria, and about to arrive at her port of destina-

tion, to wit, Portland, Oregon, and before she was completely moored thereat.

The statute provides that “every person who, not being in the United States service, and not being duly authorized by law for the purpose, goes on board of any vessel about to arrive at the place of her destination, before her actual arrival, and before she has been completely moored, without permission of the master, shall for every such offense be punishable by a fine of not more than two hundred dollars, and by imprisonment for not more than six months; and the master of such vessel may take any such person so going on board into custody, and deliver him up forthwith to any constable or police officer, to be by him taken before any justice of the peace, to be dealt with according to the provisions of this title.” (53.)

This statute is section 62 of the act of June 7, 1872 (17 Stats. 262), entitled “An act to authorize the appointment of shipping commissioners by the several circuit courts of the United States, to superintend the shipping and discharge of seamen engaged in merchant ships belonging to the United States, and for the further protection of seamen.”

In the Revised Statutes the word “vessel” is substituted for “ship” in the original.

The defendants demur to the informations on the ground: (1) “That the same does not state facts sufficient to constitute a crime;” and (2) “that the court has no jurisdiction to authorize the filing of the information by the district attorney.”

The cases were heard together. On the argument the second ground of demurrer was abandoned.

In support of the first ground of demurrer it is contended that the statute, taken in connection with section 4612 of the Revised Statutes, applies only to American vessels, of which the Troop does not appear to be one. And it is admitted by counsel that she is a British vessel.

In support of this proposition, *United States v. Menges*, 16 Fed. Rep. 557, is cited.

This case was an information under section 4601 of the Revised Statutes, taken from section 4 of the act of July 20, 1790 (1 Stats. 133), entitled “An act for the government and regula-

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tion of seamen in the merchant service,” for harboring a deserting seaman from a Norwegian vessel.

The court said that the section taken in connection with section 4612 (sec. 65 of the act of 1872) did not include a desertion from a foreign vessel, and sustained a demurrer to the information. But the court, in support of this conclusion, evidently relied on the fact that there is a treaty between the United States and Norway for the arrest and surrender of deserting seamen from the vessels of either nation in the waters of the other. (Pub. Treaties, 740, Art. 14.) Section 5280 of the Revised Statutes furnishes the means for enforcing this treaty within the jurisdiction of the United States.

Section 4612 provides: “That in the construction of this title (53) every person having the command of any vessel belonging to any citizen of the United States shall be deemed to be the ‘master’ thereof; and every person (apprentices excepted), who shall be employed or engaged to serve in any capacity, on board the same, shall be deemed and taken to be a ‘seaman’; and the term ‘vessel’ shall be understood to comprehend every description of vessel navigating on any sea or channel, lake or river, to which the provisions of this title may be applicable.”

But as I understand this section, it does not declare that the word “seaman,” as used in the statute, is confined to one employed on a vessel belonging to a citizen of the United States; but rather, and only, that every person employed on such a vessel shall be considered a “seaman.”

Nor does this section exclude foreign vessels from the operation of the statute, by declaring that a person in command of a vessel belonging to a citizen of the United States shall be considered the “master” thereof.

There is nothing to be inferred from either of these provisions that section 4606 does not include the boarding of a foreign vessel contrary thereto.

In *United States v. Menges*, *supra*, weight seems to have been given to the fact, that title 53 of the Revised Statutes, in which these sections occur, is called “Merchant Seamen.”

Now, merchant seamen are simply seamen in private vessels, as distinguished from seamen in the navy or public vessels.

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Opinion of the Court—Deady, J.

The seamen employed on private vessels of all nations are merchant seamen, and literally included in this phrase.

In *United States v. McArdle*, 2 Sawy. 367, I held in the district court, that section 4596 (section 51 of the act of 1872, and included in title 53 of the Revised Statutes), providing for the punishment of minor offenses committed by "seamen," lawfully engaged in the sea service, is applicable to a seaman engaged on a foreign vessel who is guilty of "disobedience," within the waters of the United States.

Then, as now, section 4612 was relied on as qualifying the general language of the statute, "any seaman," so as to confine it to cases of seamen engaged on American vessels.

In answer to this argument, I said and now repeat: The effect of all this (sec. 4612), is only to declare, in a certain class of cases, to wit, ships "belonging to any citizen of the United States," two things already well established: (1) That a person having the command of such a ship shall be deemed the master thereof; and (2) that every person employed thereon shall be deemed a seaman. But the section does not declare that the term "seaman," as used in the act, or that the act itself, shall be held to apply only to seamen serving on ships belonging to citizens of the United States, and therefore it does not affect the question under consideration."

But the section on which these informations are founded does not affect "seaman" as such, engaged in any service, foreign or domestic.

It provides for the punishment of any "person," be he sailor, boarding-house runner, or harbor or river pirate, who, without the authority of law or the consent of the master, presumes to go on board of "any vessel" arriving in any water of the United States before she has reached her place of destination, her ultimate port, and been completely moored thereat.

Again, the last clause but one of section 4612 seems to be conclusive on the point that the word "vessel," as used in title 53, includes a foreign vessel, as well as a domestic one; for it declares that "the term 'vessel' shall be understood to comprehend every description of vessel navigating on any sea or

channel, lake or river, to which the provisions of this title may be applicable.”

When this occurrence took place, the Troop was navigating the Columbia—a river to which the provisions of the title are applicable. Indeed, being a general statute, containing no limitations upon its operation in this respect, it is applicable to all the waters of the United States.

The evil which this section is intended to prevent and remedy is apparent, and in this district notorious. For instance, lawless persons in the interest or employ of what may be called “sailor-mongers,” get on board vessels bound for Portland, as soon as they get in the Columbia River, and by the help of intoxicants and the use of other means, often savoring of violence, get the crews ashore, and leave the vessel without help to manage or care for her. The sailor thereby loses the wages of the voyage, and is dependent on the boarding-house for the necessaries of life, where he is kept, until sold by his captors to an outgoing vessel, at an enormous price.

Can there be any reason assigned why the legislation of a civilized nation should limit the punishment for such practices to the case of the vessels of her own citizens, and leave those of foreign nations, which come here in pursuance of treaties of amity and commerce, to take care of themselves—with the marling-spike it may be?

Every commercial nation is directly interested in maintaining peace and order on its navigable waters, and affording reasonable protection to foreign vessels engaged in commerce thereon. The comity of nations requires that each one shall provide means for the arrest and punishment of all persons guilty of such depredations on commerce within its waters; and I have no doubt that such was the intention of Congress in the enactment of section 4606. Its language, “any vessel,” includes both foreign and domestic ones; and there is nothing in the context or the subject-matter to warrant its limitation to the latter, but the contrary.

Since I commenced the examination of these cases, my attention has been attracted to the case of the *United States v. Anderson*, 10 Blatchf. 226, in which Mr. Justice Benedict held (1872), that this section applies to foreign vessels. On this point he

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said: "Considering the general language of section 62 (sec. 4606, Rev. Stats.), and in view of the evil sought to be remedied thereby, and of the nature of the prohibition therein contained, the section is to be considered, as intended to protect foreign vessels, as well as vessels of the United States; and the fact that the vessel boarded by the prisoner was a foreign vessel is, therefore, of no avail, as a defense, in a prosecution under this section." In conclusion he said: "I have thought proper to submit the questions raised to the consideration of the circuit judge (Mr. Justice Blatchford), and he concurs with me in the opinion, that the rulings stated are correct."

The demurrers are overruled.

KEYES ET AL. v. EUREKA CON. MANUF. CO.

CIRCUIT COURT, NORTHERN DISTRICT OF CALIFORNIA.

JANUARY 26, 1891.

1. **PATENT—INFRINGEMENT—PRELIMINARY INJUNCTION.**—In an action for infringement, brought only a few days before the expiration of the patent, it appeared that the invention was made and patented while the patentees were in the employment of defendant, though they soon afterwards left it; that defendant had, with plaintiffs' knowledge and approval, used the invention prior to the issue of the patent, and such use had continued to the commencement of the suit, without any express contract for compensation, though one of the patentees had notified defendant's president that, after he left its employment, defendant must pay for the use of the invention at the same rate that others paid. *Held*, that there was no ground for equitable interference to restrain such use for the few remaining days of the life of the patent by preliminary injunction.
2. **IDEM—SUIT FOR ROYALTIES—NATIONAL JURISDICTION.**—The only ground of equitable jurisdiction being relief by injunction, and patent having expired before defendant was required to answer, so that no injunction could have been granted on final decree, the only remaining cause of action, being for royalties under an implied license for the use of the invention after the notice, is purely legal, and, in the absence of a proper showing as to citizenship, there is no element of national jurisdiction, and the bill must be dismissed.

Before SAWYER, Circuit Judge.

In equity.

Mr. John Flournoy, for complainants.

Messrs. Naphtaly, Frendenrich & Ackerman, and *Mr. John H. Miller*, for respondent.

SAWYER, Circuit Judge. This is a suit for damages for infringement, and to enjoin further infringement of letters patent No. 121,385, granted to complainants, Winfield Scott Keyes and Albert Arents, dated November 28, 1871. The bill was filed October 29, 1888, *twenty-nine days before the expiration of the patent*. The respondent was required by the subpoena to *appear* on the third day of December, 1888, *after the patent had expired*. The answer would not have been regularly due under the rules of the court, *till the first Monday of January, 1889*. No notice was given of an application for an injunction, *pendente lite*, and no such application was made. Consequently, before any action of the court could be had, and before respondent was required to appear in court, the term of the patent had expired, and the only remedy upon the bill filed, was, damages for an infringement; and under the circumstances of the case, a recovery of the royalties established for the use of the patent. When the patent was applied for and issued, the complainants were both in the employment of the respondent, the complainant, Keyes, as superintendent of respondent's mine, and the complainant, Arents, as assayer and smelter at respondent's mine and smelting works, each receiving a regular salary. While thus engaged in the respondent's employment, and managing its works, they made the invention covered by the patent. On April 19, 1871, the complainants put their improvement, afterwards patented, on the first furnace of respondent, before the application for a patent, and on April 24th, the date of the application for a patent, they put it on the second furnace. Those improvements were, continuously, used in respondent's works from that time on, while complainants remained in its employment, and, afterwards, till the commencement of this suit; and such use of these improvements constitute in part, at least, if not in whole, the infringement complained of in this suit. The complainant, Keyes, left respondent's employment, as superintendent, on September 1, 1872, and complainant, Arents, as assayer and smelter, on November 10, 1872. The respondent continued to use these improvements after complainants left its employment, down to the time of the commencement of this suit. Complainants

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knew of this use. It does not appear that complainant, Keyes, ever had any communication with respondent upon the subject, of the use of this improvement. But complainant, Arents, notified the president of the respondent, in June, 1872, that the company could use the improvement while he remained in its employ, but that after he left such employment he would require the company to pay what others had to pay for the use of the improvement. Mr. Arents, after he left, at various times, but when, not shown, made demands upon the secretary of the company, respondent, for payment for the use of the improvement, and in the summer of 1888, made a similar demand upon the president of the company, respondent. From July to October, 1888, complainants endeavored to reach an amicable settlement with respondent for its said use of their improvement, and on failure to make a satisfactory settlement, this suit was instituted.

The respondent does not contest the validity of the patent, or deny the use of the improvement as stated, or set up any of the defenses specially authorized by the statute. The defense is: (1) That upon the facts as they appear, no case for equitable jurisdiction is presented, and, therefore, the bill must be dismissed, under section 721 of the Revised Statutes. (2) That under the facts as they appear, the defendant had an implied license to use the invention without compensation, while Arents continued in its employ, and after he left, for the same royalties charged other parties, and, consequently, there being a license, there is no legal infringement, and the remedy of plaintiffs is an ordinary action at law to recover the amount of the royalties accrued for use under the implied license; and over such an action, no diversity of citizenship appearing, the national courts have no jurisdiction.

On both grounds, I think the bill must be dismissed. The only ground for equitable jurisdiction is an injunction. As the patent expired before the respondent was required or could have been required to appear to the suit, no injunction could have been granted in the final decree. No injunction *pendente lite* was obtained or asked for. No preliminary restraining order was asked of the court, and no notice given to respondent

that an injunction *pendente lite* would be asked. Had an application been made upon notice, and the facts now shown been made to appear in response to the motion, as they, undoubtedly, would have been, no court of equity, I apprehend, would have granted a temporary injunction for the few remaining days of the life of the patent, even if the application could have been brought to a hearing before its termination. The respondent had been using this improvement, introduced into its works by the complainants themselves, in part, at least, before the patent was applied for, and long before it was issued, with the knowledge and manifestly the tacit approval of the complainants, with the understanding that it could use it for the usual royalty charged others, down to within a few days of the expiration of the patent. Under such circumstances it would have been grossly inequitable to suddenly enjoin it from further use for the remaining few days the patent had to run, had such an injunction been, seasonably, asked. The laches and tacit, not to say express acquiescence of the complainants in the use of the improvements as shown by the record, estopped them from equitably demanding an injunction. Under the special circumstances of the case, complainants were not equitably entitled to an injunction *pendente lite*, had one been demanded. And this is no impeachment of the general doctrine announced in many cases, including those cases cited by complainants' counsel, that a patentee is ordinarily entitled to an injunction when his patent is wilfully infringed, without any fault of his own, or other circumstances affecting the equities of the case in favor of respondent for even a few remaining days of the life of his patent. Undoubtedly, an injunction *pendente lite* during the life of the patent should not be refused while the patent is in force, merely because before a final decree can be had in the ordinary course of proceeding, the term of the patent would expire. But other important circumstances affect the equities of this case, that take it out of the ordinary course.

I am also of opinion, upon the undisputed facts disclosed, that there was an implied license, at least, to use this patent by the respondent, upon the same terms or royalties fixed for other parties, from the time complainants left the employment of

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respondent, and that the use of it in the manner shown, and so long acquiesced in, is not an infringement in the proper sense of that term. The remedy of complainants, therefore, is an action at law to recover the royalties accrued for the use in pursuance of such implied license. This being so, and no diversity of citizenship of the parties appearing, no element of jurisdiction in the national courts is shown, and on that ground, also, the bill must be dismissed.

Let the bill be dismissed upon the grounds stated with costs.

BOWERS v. SUPREME COUNCIL AMERICAN LEGION OF HONOR.

CIRCUIT COURT, NORTHERN DISTRICT OF CALIFORNIA.

JANUARY 26, 1891.

1. REMOVAL OF CAUSES — TIMELY APPLICATION — REMAND. — Where a petition for removal is not filed at the time or before defendant is required by the state practice to plead to the declaration or complaint, as provided in the act of Congress, March 3, 1875, section 5 (25 Stats. at Large, 434, sec. 3), the case must be remanded to the state court, whether motion to that effect be made or not.

Before SAWYER, Circuit Judge.

At law.

Messrs. Campbell & Campbell, for complainant.

Mr. William C. Flint, for defendant.

SAWYER, Circuit Judge. This action was commenced in the superior court of the city and county of San Francisco, state of California, by filing a complaint verified October 30, 1889, but it does not appear when the complaint was filed. Notice of appearance was served on plaintiff's attorney, dated November 12, 1889, filed November 14, 1889. On the same day, November 12, 1889, a stipulation was entered into by the parties bearing date November 12, 1889, whereby defendant "may have ten days' additional time from this date in which to appear and plead in the above-entitled action." Stipulation filed November 15, 1889. This gave defendant till November 22d in which to plead, and consequently, November 22d was the day

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upon which defendant was required to answer in the regular course of proceedings under the laws of California, and on that day an answer was due. On January 4, 1890, defendant filed a demurrer, and on the same day, January 4, 1890, a petition was filed to remove the cause to the United States circuit court. The petition was required by the statute to be filed, "*at the time, or any time before*, the defendant is required by the laws of the state, or the rule of the state court in which such suit is brought, to answer or plead to the declaration or complaint of the plaintiff, for the removal of such suit into the circuit court to be held in the district where such suit is pending." (25 Stats. at Large, p. 434, sec. 3.)

The answer was due on *November 22d*. The petition not having been filed till January 4, 1890, was, therefore, too late, and the cause was not lawfully removed. (*Dixon v. Telegraph Co. ante*, p. 17; *Austin v. Gagan, ante*, p. 151.)

It must be remanded to the state court, whether motion to that effect be made or not, under the requirements of section 5 of the act of 1875, and it is so ordered.

UNITED STATES v. SOUTHERN PACIFIC RAILROAD CO. ET AL.

UNITED STATES v. COLTON MARBLE AND LIME CO. ET AL.

CIRCUIT COURT, SOUTHERN DISTRICT OF CALIFORNIA.

MARCH 6, 1891.

1. PUBLIC LANDS—RAILROAD COMPANIES—PLEADING.—The act of Congress of March 3, 1871, granted certain lands to the S. P. R. R. Co., and provided that if its route, when designated, should be found to be on the line of any other road to which land had also been granted, the amount theretofore granted should be deducted from the quantity thereby granted to the S. P. R. R. Co., so far as their routes should be on the same general line. In bills brought by the government to set aside a patent to the S. P. R. R. Co., it is alleged that the route of the A. & P. Co., to which land had also been granted, and the route of the S. P. R. R. Co., "cross each other in the state of California." *Held*, that this allegation does not bring the land within the exception of said act, and that under such allegation, even if proof showed that the routes are in fact upon the same general line, it would not avail the government.
2. RAILROAD COMPANIES—CONGRESSIONAL GRANT.—The act of Congress of July 27, 1866, fully conferred upon the S. P. R. R. Co. the right to build the road described in and earn the land granted by that act, without the authority of the state legislature.

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3. **SOUTHERN PACIFIC RAILROAD COMPANY—AMALGAMATION—RECOGNITION BY CONGRESS.**—The act of Congress of July 27, 1866, recognized the S. P. R. R. Co., organized under a general law of California, and made it certain grants of land. Pursuant to the act of the California legislature of March 1, 1870, authorizing any corporation already formed, or thereafter to be formed, to amend its articles of association, and the act of April 4, 1870, in terms authorizing the S. P. R. R. Co. to file new and amendatory articles of association to enable it completely to conform to the act of Congress of July 27, 1866 the S. P. R. R. Co. and other railroads, October 11, 1870, filed articles amalgamating and consolidating themselves into a new corporation—S. P. R. R. Co. The act of Congress of March 3, 1871, authorized the S. P. R. R. Co. of California (subject to the laws of California) to construct a line of railroad from a point at or near Tehachapa Pass, by way of Los Angeles, to the T. P. R. R. at or near the C. River, with the same rights, grants, and privileges, and subject to the same limitations, restrictions, and conditions as were granted to said S. P. R. R. Co. of California by the act of July 27, 1866. *Held*, that Congress thereby recognized that the S. P. R. R. Co. of California, existing March 3, 1871, under the articles of amalgamation and consolidation of October 11, 1870, was the same S. P. R. R. Co. to which the grant of July 27, 1866, was made. The authority conferred on said company by the act of March 3, 1871, to build the road designated, was made subject, not only to the general laws of California authorizing railroad corporations to amalgamate and consolidate their interests and amend their articles of incorporation, but to the special act of April 4, 1870.
4. **IDEM.**—Pursuant to state authority, recognized by and made a part of the congressional grant of March 3, 1871, the S. P. R. R. Co., April 15, 1871, filed amended articles of incorporation; and August 12, 1873, filed, together with the S. P. Branch R. R. Co., articles of amalgamation and consolidation, under the name of the S. P. R. R. Co. *Held*, that while in one sense a new corporation was formed, each was substantially and practically the same S. P. R. R. Co. mentioned in the acts of Congress, and was so recognized by Congress, and that the articles of amendment, amalgamation, and consolidation were authorized by congressional as well as by state legislation.
5. **IDEM.**—Commissioners having from time to time been appointed to report in regard to the construction of the Southern Pacific Railroad, the road having been accepted by the President, and having been used by the government in the transportation of mail, military stores, etc. *Held*, that these acts were acts recognizing the defendant company as the S. P. R. R. Co., to which the act of March 3, 1871, applies, and that the defendant company, being subject to burdens imposed by the act, is entitled to the benefits conferred by it as a consideration for those burdens.
6. **RAILROAD COMPANIES—SUCCESSORS AND ASSIGNS.**—The act of Congress of July 27, 1866, having expressly granted lands to the S. P. R. R. Co., its successors and assigns, it is *held*, that if the consolidated company with the amended articles of incorporation is not technically the same corporation referred to in the act of March 3, 1871, it is within the express provisions of the grant, being the successor or assign of said company.
7. **MEXICAN GRANTS—WHEN CEASE TO BE SUB JUDICE.**—When a Mexican grant, by specific boundaries, carrying all the lands within the designated boundaries, has been confirmed by a decree which has become final, the said decree specifically pointing out and designating the corners by natural objects on the ground, and the connecting lines, all lands outside those specific monuments and lines, from the date when the decree becomes final, cease to be *sub judice*, if they ever were in that condition, within the meaning of those terms as used by the supreme court in the cases of *Newhall v. Sanger*, *Doolan v. Carr*, and *United States v. McLaughlin*. (Ross, J., dissenting.)

Before SAWYER, Circuit Judge, and ROSS, District Judge.

Hon. W. H. Miller, Attorney-General, of counsel, *Hon. Willoughby Cole*, United States Attorney, of counsel, and *Mr. Joseph H. Cull*, Special Assistant United States Attorney, solicitor, for complainant.

Hon. Creed Haymond, of counsel, *Mr. Joseph D. Redding*, solicitor, *Mr. A. B. Hotchkiss*, *Hon. J. D. Bicknell*, *Mr. C. H. Wilson*, *Mr. H. C. Rolfe*, *Messrs. Chapman & Hendrick*, *Messrs. Anderson, Fitzgerald & Anderson*, *Mr. Edwin Baxter*, and *Mr. J. L. Murphey*, of counsel, for respondents.

ROSS, J. When these cases, which were argued and submitted together, were before the court on demurrers to the amended bills (39 Fed. Rep. 132), it was held that the grant to the Atlantic and Pacific Railroad Company of date July 27, 1866, conferred upon that company no right of any nature to any particular piece of land within the indemnity limits of that grant prior to its selection, and, as a consequence, that the fact that lands were within such indemnity limits did not exclude them from the subsequent grant to the Southern Pacific Railroad Company of date March 3, 1871, because of that provision of the act of July 27, 1866 (to which the act of March 3, 1871, referred for the terms of the grant to the Southern Pacific Company), which reads: "*Provided, however, that this section shall in no way affect or impair the rights, present or prospective, of the Atlantic and Pacific Railroad Company, or any other railroad company.*" But because the amended bills showed on their face that the lands in controversy, which are within the indemnity limits of the grant to the Atlantic and Pacific Company and within the primary limits of that to the Southern Pacific Company, were at the time of the grant to the Southern Pacific Company claimed to be within the limits of the Mexican grant San Jose, which latter grant, it was alleged, was then *sub judice*, and because of that provision of the grant to the Southern Pacific Company to the effect that if the route it was authorized to designate should be found to be upon the line of any other railroad route to aid in the construc-

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tion of which lands had been theretofore granted by the United States, as far as the routes are upon the same general line, the amount of land theretofore granted should be deducted from the amount granted to the Southern Pacific Company, coupled with the fact then alleged, and by the demurrers admitted, that the routes of the two roads were upon the same general line, the amended bills were considered by the court to state, in each of those respects, good cause for annulling the patents issued to the Southern Pacific Railroad Company.

Since the ruling upon the demurrers the bills have been still further amended, and the cases are now submitted for decision upon the proofs taken and the master's report.

The bills as last amended omit the fact theretofore alleged that the routes of the two roads are upon the same general line, and the question decided upon the demurrers in respect to that point is therefore no longer involved. The allegation of the present bills in regard to that matter is that the two routes "cross each other in the state of California, as will more particularly appear" from a certain annexed map. The fact that is made the basis of the exception in question is that the two routes shall be upon the same general line, not that they cross each other. If the two routes are in fact upon the same general line, and the government relied upon that fact for a recovery, it was of course essential that the fact be alleged. Not being alleged, it cannot avail the complainant even if the proof shows that it exists.

In respect to the "present and prospective" clause of the act of July 27, 1866, I adhere to the views expressed when the cases were considered on demurrer, in so far as concerns the lands then and now involved, namely, lands within the indemnity limits of the grant to the Atlantic and Pacific Company, and do not care to add anything to what was then said on that point in regard to such lands.

One question remains for decision in each of the cases, namely, should the patents issued to the defendant company be annulled upon the ground that the defendant, though having the same name, is a different corporation from that to which the grant was made, and that the company to which the grant

was made did not build the road and thereby earn the granted lands? And in the consolidated cases Nos. 67, 68, and 69 there remains for decision the further question, does the case show that the lands in controversy were, at the time of the grant to the Southern Pacific Railroad Company, within the claimed limits of the Mexican grant San Jose, and was that grant then *sub judice*?

The affirmative of both of these questions is urged with much earnestness on the part of the government.

The Southern Pacific Railroad Company was originally incorporated December 2, 1865, under a general law of the state of California, approved May 20, 1861 (Stats. Cal. 1861, p. 607), entitled "An act to provide for the incorporation of railroad companies and the management of the affairs thereof, and other matters relating thereto." The act, among other things, authorized such corporations "to receive, hold, take, and convey, by deed or otherwise, the same as a natural person might or could do, such voluntary grants and donations of real estate and other property of every description, as shall be made to it, to aid and encourage the construction, maintenance, and operation of such railroad." The act also provided that it should be lawful for two or more railroad companies to amalgamate and consolidate their capital stock, debts, property, assets, and franchises in such manner as should be agreed upon by the board of directors of such companies so desiring to amalgamate and consolidate their interests. By the act of Congress, approved July 27, 1866 (14 Stats. 292), creating the Atlantic and Pacific Railroad Company, and empowering it to construct and maintain a continuous railroad and telegraph line from Springfield, Missouri, to the Pacific coast, Congress recognized the Southern Pacific Railroad Company, organized as aforesaid, and authorized it to connect with the Atlantic and Pacific Railroad at such point, near the boundary line of California, as the Southern Pacific Company should deem most suitable for a railroad to San Francisco.

For the purpose of aiding the construction of the line authorized to be built, and thereby securing the safe and speedy transportation of mails, troops, munitions of war, and public

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stores, Congress, by the act of July 27, 1866, granted to the Atlantic and Pacific Railroad Company a right of way over the public domain, and also made to it a grant of public lands along the route; and the railroad so to be constructed was declared to be a post route and military road, subject to the use of the United States for postal, military, naval, and all other government service, and to such regulations as Congress might impose for restricting the charges for government transportation. By section 18 of the same act, the Southern Pacific Railroad Company was given similar grants of land, subject to the limitations and conditions provided in the act, and was required to construct its road under like regulations as to time and manner as provided in respect to the Atlantic and Pacific Company. The grant thus made to the Southern Pacific Railroad Company was accepted by it on the 24th of November, 1866, and on January 3, 1867, it filed in the office of the commissioner of the general land office a map showing its definite line of route from a point on the southerly edge of the bay of San Francisco, in a southeasterly direction, to a point on the east line of the state of California on the Colorado River, near the Needles. The Southern Pacific Railroad Company was not authorized by its original charter to extend its road to the Colorado River. But with a view to further the intent of the act of Congress of July 27, 1866, and to enable the Southern Pacific Company to take the benefit of the grant thereby conferred upon it, the legislature of the state of California, on the 4th of April, 1870, passed an act, entitled "An act to aid in giving effect to an act of Congress relating to the Southern Pacific Railroad Company" (Stats. of Cal. 1870, p. 883), which reads as follows:—

"Whereas, by the provisions of a certain act of Congress of the United States of America, entitled 'An act granting lands to aid in the construction of a railroad and telegraph line from San Francisco to the eastern line of the state of California, approved July 27, 1866,' certain grants were made to, and certain rights, privileges, powers, and authority were vested in and conferred upon the Southern Pacific Railroad Company, a corporation duly organized and existing under the laws of the state of California;

therefore, to enable the said company to more fully and completely comply with and perform the requirements, provisions, and conditions of the said act of Congress, and all other acts of Congress now in force, or which may hereafter be enacted, the state of California hereby consents to said act; and the said company, its successors and assigns, are hereby authorized and empowered to change the line of its railroad so as to reach the eastern boundary line of the state of California by such route as the company shall determine to be the most practicable, and to file new and amendatory articles of association, and the right, power, and privileges hereby granted to, conferred upon and vested in them, to construct, maintain, and operate, by steam or other power, the said railroad and telegraph line mentioned in said act of Congress, hereby confirming to and vesting in said company, its successors and assigns, all the rights, privileges, franchises, power, and authority conferred upon, granted to, or vested in said company by the said acts of Congress, and any act of Congress which may be hereafter enacted."

Shortly prior to this, and at the same session of the legislature, a general act was passed authorizing any corporation already formed, or thereafter to be formed, to amend its articles of association. (Act of March 1, 1870, Stats. 1869-70, p. 107.) But the act of April 4, 1870, in terms authorized the Southern Pacific Railroad Company to file new and amendatory articles of association, and this for the avowed purpose of enabling it to more perfectly and completely conform to the act of Congress of July 27, 1866; and the rights, privileges, and powers conferred by the act of April 4, 1870, on the Southern Pacific Railroad Company, were given to it, its successors and assigns.

This state legislation, as was decided by the supreme court in the case of *California v. Pacific R. R. Co.* 127 U. S. 44, was not necessary to empower the Southern Pacific Company to build the line of road authorized by the act of Congress of July 27, 1866, and thereby to earn the granted lands, for the reason that the right to do so was fully conferred by Congress itself. But it was enacted to remove all doubt in respect to the company's power to construct the road, and for the expressly

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declared purpose of enabling it to comply with the act of Congress, and thereby to receive the benefits conferred.

It is stipulated by counsel in these cases that on the 11th of October, 1870, the Southern Pacific Railroad Company, the San Francisco and San Jose Railroad Company, the Santa Clara and Pajaro Valley Railroad Company, and the California Southern Railroad Company availed themselves of the aforesaid acts of May 20, 1861, and April 4, 1870, of the state legislature, and duly filed articles by which they amalgamated and consolidated themselves into a new corporation, under the name and style of the Southern Pacific Railroad Company, and did thereby vest in such new corporation their several capital stocks, debts, properties, assets, roads, telegraphs, lands, franchises, rights, titles, privileges, claims, and demands of every kind, the object and purpose of the new corporation being declared in the articles to be “to purchase, construct, own, maintain, and operate a continuous line of railroad from the city of San Francisco, in the state of California, through the city and county of San Francisco, the counties of San Mateo, Santa Clara, Monterey, Fresno, Tulare, Kern, San Bernardino, and San Diego, to some point on the Colorado River, in the southeastern part of the state of California, a distance of seven hundred and twenty miles, as near as may be; also a line of railroad from a point at or near Tehachapa Pass, by way of Los Angeles, to the Texas Pacific Railroad, at or near the Colorado River, a distance of three hundred and twenty-four miles, as near as may be” Such was the Southern Pacific Railroad Company when Congress passed the act of March 3, 1871. (16 U. S. Stats. 573.) By that act Congress incorporated the Texas Pacific Railroad Company, with power to construct and maintain a continuous railroad and telegraph line from Marshall, in the state of Texas, to a point at or near El Paso; thence through New Mexico and Arizona to San Diego, pursuing as near as might be the thirty-second parallel of latitude. To aid in its construction, Congress gave it, also, the right of way over the public domain, and made to it a grant of public lands along the route. The nineteenth section provided:—

“That the Texas Pacific Railroad Company shall be, and it is hereby declared to be a military and post road; and for the purpose of insuring the carrying of the mails, troops, munitions of war, supplies, and stores of the United States, no act of the company nor any law of any state or territory shall impede, delay, or prevent the said company from performing its obligations to the United States in that regard; *provided*, that said road shall be subject to the use of the United States for postal, military, and all other governmental services at fair and reasonable rates of compensation, not to exceed the price paid by private parties for the same kind of service; and the government shall at all times have the preference in the use of the same for the purpose aforesaid.”

The twenty-third section of the act is as follows: “That for the purpose of connecting the Texas Pacific Railroad with the city of San Francisco, the Southern Pacific Railroad Company of California is hereby authorized (subject to the laws of California) to construct a line of railroad from a point at or near Tehachapa Pass, by way of Los Angeles, to the Texas Pacific Railroad, at or near the Colorado River, with the same rights, grants, and privileges, and subject to the same limitations, restrictions, and conditions as were granted to said Southern Pacific Railroad Company of California by the act of July 27, 1866; *provided, however*, that this section shall in no way affect or impair the rights, present or prospective, of the Atlantic and Pacific Railroad Company, or any other railroad company.”

In the case of *Southern Pacific R. R. Co. v. Poole*, 12 Sawy. 544, it was contended that at the date of the passage of the act of Congress of March 3, 1871, the Southern Pacific Railroad Company was not authorized by its charter to build the line of road from Tehachapa Pass, by way of Los Angeles, to connect with the Texas Pacific Road, and, as by the twenty-third section of that act that company was “only authorized, *subject to the laws of California*, to construct a line of railroad from a point at or near Tehachapa Pass,” etc., the grant was necessarily inoperative and void. The court accepted the fact as there stated, that at the time of the passage of the act of Congress the company did not have, according to the laws of

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California, the legal capacity to build the road on the line designated, and yet held against the contention. But, according to the stipulation of counsel in these cases, the fact was *not* as there stated. At the time of the passage of the act of Congress of March 3, 1871, the Southern Pacific Railroad Company was, according to the stipulation of counsel, existing under the articles of amalgamation and consolidation, which was its charter, of October 11, 1870, entered into pursuant to the provisions of the state act already referred to; and, as has been seen, one of the purposes of the corporation as expressly declared in those articles was to construct, own, maintain, and operate “a line of railroad from a point at or near Tehachapa Pass, by way of Los Angeles, to the Texas Pacific Railroad, at or near the Colorado River, a distance of three hundred and twenty-four miles, as near as may be.”

By the act of March 3, 1871, Congress made this state corporation, with that state authority, one of its agencies in the establishment of the national highway provided for, and authorized it, “subject to the laws of California, to construct a line of railroad from a point at or near Tehachapa Pass, by way of Los Angeles, to the Texas Pacific Railroad, at or near the Colorado River, with the same rights, grants, and privileges, and subject to the same limitations, restrictions, and conditions as were granted to *said* Southern Pacific Railroad Company of California by the act of July 27, 1866,” with the proviso already quoted.

Here was not only a plain recognition by Congress that the Southern Pacific Railroad Company of California, existing at the time of the grant of March 3, 1871, under the articles of amalgamation and consolidation of October 11, 1870, was the same Southern Pacific Railroad Company to which the grant of July 27, 1866, was made, but the authority to build the road designated conferred on that company by the act of March 3, 1871, was in terms made subject to the laws of California. Those laws, as has already been pointed out, not only authorized two or more railroad corporations to amalgamate and consolidate their interests and to amend their articles of incorporation, but the state act of April 4, 1870, expressly

declared that the powers therein conferred upon the Southern Pacific Railroad Company, its successors and assigns, were for the very purpose of enabling it, its successors and assigns, to more fully and completely comply with and perform the requirements, provisions, and conditions of the act of Congress of July 27, 1866, and any other act or acts of Congress that might be thereafter enacted.

Pursuant to this state authority, recognized by and made a part of the congressional grant of March 3, 1871, the Southern Pacific Railroad Company, on the 15th of April, 1871, filed in the proper office of the state amended articles of incorporation, and, on the 12th of August, 1873, it filed, together with the Southern Pacific Branch Railroad Company, articles of amalgamation and consolidation under the name of the Southern Pacific Railroad Company, in both of which articles one of the purposes is stated to be the building of the line from San Francisco through the several named counties, in a southeasterly direction, to the Colorado River, and the building of the line from Tehachapa Pass, by way of Los Angeles, to connect with the Texas Pacific at or near the Colorado River, and thus to secure to itself the grants, rights, and privileges conferred upon it by the congressional grants.

While by the several articles of amalgamation and consolidation, a new corporation, in one sense, was formed, each was substantially and practically the same Southern Pacific Railroad Company mentioned in the acts of Congress, and had for its main purpose the building of the lines of railroad therein designated, and the obtaining of the land grants for doing so. Congress, in passing the act of March 3, 1871, evidently did not consider that the Southern Pacific Railroad Company, by entering into the articles of amalgamation and consolidation of October 11, 1870, and thereby, in one sense, becoming a "new" corporation, had become a distinct and independent one; for in that very act it designated the Southern Pacific Railroad Company to which that act applied as the same Southern Pacific Railroad Company to which the act of July 27, 1866, applied. Not only so, but the act of March 3, 1871, in terms authorized that company to build the designated road subject to the laws

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of California, which laws, as has been shown, expressly authorized the amalgamations and consolidations and the amendments of articles that were made. There was therefore congressional as well as state legislation authorizing the articles of amendment, amalgamation, and consolidation, and I can see no just ground for holding that the defendant company, which it is conceded built the required road within the designated time, was not the company to which the grant was made.

In other ways, also, the defendant company has been recognized as the Southern Pacific Railroad Company to which the act of March 3, 1871, applies. It has been so recognized by the appointment of commissioners from time to time as the road was being built, to report in regard to its construction; by the acceptance of the road by the President, in its entirety, as having been duly completed under and by authority of the act; and by the use of the road by the government in the transportation of its mail, military stores, etc., pursuant to the provisions of the act. Manifestly, the defendant company cannot justly be held subject to the burdens imposed by the act, and yet not entitled to the benefits conferred by it as a consideration for those burdens.

“Besides,” as said by Judge SAWYER, in the case of the *Southern Pacific R. R. Co. v. Poole*, *supra*, “section 2 of the Atlantic and Pacific act, imported into the Texas and Pacific act by virtue of section 23 of the latter and section 18 of the former, giving to the Southern Pacific Railroad Company of California ‘the same rights, grants, and privileges, and subject to the same limitations, restrictions, and conditions’ prescribed in the former act, expressly says the lands are granted to the company, ‘its successors and assigns.’ [These words, “successors and assigns,” of course mean something.] If the consolidated company, with amended articles of incorporation, is not technically the same corporation referred to in the Texas Pacific act, it is, substantially and practically, so. If not, it is certainly its successor or assign, and is thus within the express provisions of the grant.”

The points above considered are common to all of the cases, and dispose of case No. 88. In the consolidated cases, Nos. 67,

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68, and 69, the question in respect to the Mexican grant San Jose remains to be determined.

That grant was for the place called San Jose, and in conformity with the *deseño* attached to the petition for the grant and within the boundaries therein given. The grant was made by Juan B. Alvarado, at the time governor of Upper California under the Mexican government, and received the approval of the departmental assembly. The claim thereto was presented in September, 1852, by the grantees to the board of land commissioners pursuant to the provisions of the act of Congress of March 3, 1851, entitled "An act to ascertain and settle the private land claims in the state of California." (9 Stats. at Large, 631.) The claim was confirmed by the board of land commissioners, and in December, 1854, the district court, to which the case had been taken on appeal, confirmed the decrees of the board, giving to each of the three claimants an equal undivided one-third part "of the lands of San Jose, granted by Juan B. Alvarado, governor of California, to Ignacio Palomares and Ricardo Vejar on April 15, 1837, and regranted by said governor on March 14, 1840, to said Palomares and Vejar and to Louis Arenas, as described in the grant first mentioned and the map to which the same referred, and which boundaries fully appear from the act of judicial possession," described as follows: "Commencing at the foot of a black willow tree, which was taken for a corner, and between the limbs of which a dry stick was placed in the form of a cross; thence westerly nine thousand seven hundred (9,700) varas to the foot of the hills called 'Las Lomas de la Puente,' taking for a landmark a large walnut tree on the slope of a small hill on the side of the road which passes from the said San Jose to the Puente, making a cut (*caldura*) on one of the limbs with a hatchet; thence northerly ten thousand four hundred (10,400) varas to the creek (*arroyo*) of San Jose opposite a high hill where a large oak was taken as a boundary, in which was placed the head of a beef, and some of its limbs chopped; thence easterly ten thousand six hundred (10,600) varas to the creek (*arroyo*) of San Antonio, taking for a landmark two young cotton-woods which stand near each other, on the bark of which crosses were made; thence

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southerly nine thousand seven hundred (9,700) varas to the place of beginning." The decree of the district court became final in 1857. In 1858 the surveyor-general for California caused the land thus granted and confirmed to be surveyed, the survey being made by deputy-surveyor Hancock. That survey did not include any portion of the lands in controversy here. It was approved by the surveyor-general for California on the 14th of January, 1860; but the case shows that it did not receive the approval of the commissioner of the general land office.

On the 14th of June, 1860, Congress passed an act, entitled "An act to amend an act, entitled an act to define and regulate the jurisdiction of the district courts of the United States in California in regard to the survey and location of confirmed private land claims" (12 Stats. at Large, 33), by which the district courts were given authority to order into court for examination and adjudication the survey of such private claims. This act, however, as was held by the supreme court, did not apply to surveys made prior to its passage unless they had been approved by the surveyor-general, *and* had been "at the time of the passage of the act returned into the district court, or in relation to which proceedings were then pending for the purpose of contesting or reforming the same."

The grant claimants were not satisfied with the Hancock survey, and subsequent to the passage of the act of June 14, 1860, brought it before the district court for review, in supposed conformity with the provisions of that act; but that court, finding that the act did not apply to that survey, on November 21, 1867, dismissed the proceedings, and remitted the papers to the surveyor-general. In the mean time Congress had passed the acts of July 1, 1864 (13 Stats. Ch. 194), and July 23, 1866. (14 Stats. 220.) The act of July 1, 1864, was entitled "An act to expedite the settlement of titles to lands in the state of California," and by its sixth section provided that it should be the duty of the surveyor-general for California to cause all private land claims finally confirmed to be accurately surveyed, and plats thereof to be made whenever required by the claimants; provided that each claimant requesting a survey and plat

should first deposit in the district court of the district within which the land was situated a sufficient sum of money to pay the expenses of such survey and plat, and of the publication required by the first section of the act.

The act of July 23, 1866, was entitled "An act to quiet land titles in California," the eighth section of which provided: "That in all cases where a claim to land by virtue of a right or title derived from the Spanish or Mexican authorities has been finally confirmed, and a survey and plat thereof shall not have been requested within ten months from the passage of this act, as provided by sections 6 and 7 of the act of July 1, 1864, to expedite the settlement of titles to lands in the state of California, and in all cases where a like claim shall hereafter be finally confirmed, and a survey and plat thereof shall not be requested as provided by said sections within ten months after the passage of this act, or any final confirmation hereafter made, it shall be the duty of the surveyor-general of the United States for California, as soon as practicable after the expiration of ten months from the passage of this act, or such final confirmation hereafter made, to cause the lines of the public surveys to be extended over such lands; and he shall set off, in full satisfaction of such grant, and according to the lines of the public surveys, the quantity of land confirmed in such final decree, and as nearly as can be done in accordance with such decree; and all the land not included in such grant as so set off shall be subject to the general laws of the United States; *provided*, that nothing in this act shall be construed so as in any manner to interfere with the right of *bona fide* pre-emption claimants."

On the 9th of January, 1868, the surveyor-general for California reported to the commissioner of the general land office that an application had been made to him by one of the grant claimants for a survey of the grant, and in response to that report the commissioner directed that the Hancock survey made in 1858, and approved by the surveyor-general January 4, 1860, be published in accordance with the provisions of the act of Congress of July 1, 1864. Instead of doing so, the surveyor-general, it seems, caused another survey of the grant to be made in August of that year, to wit, 1868, by deputy-surveyor Thompson, which

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survey included a portion of the lands involved in cases 67, 68, and 69, and was approved by the surveyor-general.

Both the Hancock and Thompson surveys were subsequently before the commissioner and afterwards before the secretary of the interior for consideration and decision, the claimants contending that the lines of the Thompson survey correctly represented the lines of the grant; and the question of survey was so pending at the time of the grant to the Southern Pacific Railroad Company of March 3, 1871. That question, as the record shows, related to the true location of the natural calls of the grant, and was finally determined by the secretary September 20, 1872, by which the lines as represented by the Thompson survey were rejected, and those of the Hancock survey, with some modifications, adopted, the direction of the secretary being: "That the lines of the survey of San Jose be run as follows: Commencing at the willow at the southeast corner, at the point designated by Hancock as 'large rock in center of water pool, agreed on as the place where the black willow of the juridical possession once existed;' thence westerly along the base of the mountains, so as to include the springs near the ravine, to the black walnut; thence northerly to the oak of the Tueaja; thence northeasterly to the Botello oak; thence easterly in a direct line to a point on the arroyo of San Antonio nine thousand seven hundred varas north of the black willow, and thence southerly along said arroyo of San Antonio to the place of beginning."

In accordance with these instructions another survey of the grant was made by the surveyor-general, upon which a patent was issued; and as thus surveyed and patented none of the lands in controversy were included in the lines of the grant.

While the final result of these proceedings was a conclusive determination that as a matter of fact none of the lands in controversy ever were within the true lines of the San Jose grant, they also show beyond doubt that some of them were *claimed* by the grant claimants to be within the boundaries of the grant, and that such claim was made and maintained at the time of the congressional grant to the Southern Pacific Railroad Company of March 3, 1871.

It is contended that the surveyor-general had no authority

to cause the Thompson survey to be made while the previous survey of Hancock was pending and undetermined, and that the Thompson survey was never considered by the commissioner of the general land office or the secretary of the interior “as a survey but only as an *exhibit*.”

Let all of this be admitted, and the fact that is determinative of the question as to whether the lands in controversy here were embraced by the grant to the Southern Pacific Railroad Company of March 3, 1871, remains the same. Considered only as an “exhibit,” the Thompson survey, representing as it did what the claimants contended were the true lines of the grant, was and is evidence of the fact that they *claimed* that the lands embraced by that survey (including a portion of the lands in controversy here) were within the boundaries of the Mexican grant; and that claim was asserted up to the time of the final decision of the secretary of the interior in September, 1872. It is not the validity of such claim, but the fact that it was made, that excludes the lands embraced by it from the category of public lands within the meaning of the railroad land grants, if excluded at all. (*Doolan v. Carr*, 125 U. S. 632.)

It is urged that because the San Jose was a grant by specific boundaries, and was confirmed with the same boundaries, no land that was not finally ascertained by the land department to be within those boundaries is excluded from the railroad grant, if otherwise within its limits. This is practically to wipe out entirely the doctrine announced by the supreme court in *Newhall v. Sanger*, 92 U. S. 761; *Doolan v. Carr*, 125 U. S. 638, and in other cases, that the *status* of lands included in a Spanish or Mexican claim pending before tribunals charged with the duty of adjudicating it was such that they were not included in the phrase “public lands” of the railroad land grants. “Those Mexican claims,” said the court in *Doolan v. Carr*, “were often described, or attempted to be described, by specific boundaries. They were often claims for a definite quantity of land within much larger out-boundaries, and they were frequently described by the name of a place or ranche. To the extent of the claim when the grant was for land with specific boundaries, or known by a particular name, and to the

extent of the quantity claimed within out-boundaries containing a greater area, they are excluded from the grant to the railroad company. Indeed, this exclusion did not depend upon the validity of the claim asserted, or its final establishment, but upon the fact that there existed a claim of a right under a grant by the Mexican government, which was yet undetermined, and to which, therefore, the phrase 'public lands' could not attach, and which the statute did not include, although it might be found within the limits prescribed on each side of the road when located."

In the case of the *United States v. McLaughlin*, 127 U. S. 428, it was held, that as in the case of a floating grant the Mexican government retained the right to locate the quantity granted in such part of the larger tract described as it saw fit, and as the government of the United States succeeded to the same right, the latter government might dispose of any specific tracts within the exterior limits of the grant, provided a sufficient quantity was left therein to satisfy the private grant; and, accordingly, that in cases of floats, the railroad land grants might attach to lands within such exterior boundaries, provided a sufficient quantity of land was left therein to satisfy the private grant. But while thus modifying what was generally understood to have been the effect of the decision in *Newhall v. Sanger*, the court, in *United States v. McLaughlin*, proceeded to declare (127 U. S. 455) that "the reasoning of the court in *Newhall v. Sanger* is entirely conclusive as to all definite grants which identified the land granted, such as the case before it then appeared to be," but went on to show that it was not fairly applicable to floats.

I do not see how there can well be a decision more directly to the point that in cases of Mexican grants by specific boundaries, lands which are claimed by the grantees to be within those boundaries are excluded from the category of public lands to which the railroad land grants apply, if at the date of the latter the question of the true location of the boundaries of the private grant is pending and undetermined. If to such a case the doctrine of *Newhall v. Sanger*, and the other cases approving it, does not apply, it does not apply to any case; for it does not

apply to floats, as was pointed out in *United States v. McLaughlin*, and grants by specific boundaries and by name manifestly stand upon the same footing.

It is contended that as the San Jose grant was one by specific boundaries the claim ceased to be *sub judice* when the decree of confirmation became final in 1857; that nothing then remained to do but apply the description to the ground and survey the lines. If so, precisely the same thing is true in respect to floats. When the decree of confirmation in such a case became final, nothing remained to do but locate the quantity and survey the lines. In either case, that duty, except in the matter of such surveys as came within the provisions of the act of Congress of June 14, 1860, devolved upon the land department of the government, and was subject, first, to the action of the surveyor-general, and then, in turn, to that of the commissioner of the general land office and the secretary of the interior. The records of the land department put in evidence in these cases clearly show that the contest over the survey of the San Jose grant was in relation to the identity of the natural calls of the grant, the grantees claiming that the true location of the trees and other objects called for in the specific description of the grant would include within those boundaries a portion of the lands in controversy here. If that contention was well founded, undoubtedly the lands so included would not be public lands of the United States. It would seem plain enough, therefore, that until that question was finally decided it could not be known whether the lands so claimed were public lands or not. Under the laws of the United States the duty of deciding that question devolved, as has been said, upon the officers of the land department. Its ultimate determination was vested in the secretary of the interior. Had he decided that the lines as represented by the Thompson survey were the true boundaries of the grant, such decision would of course have been equally conclusive as the one that was made; and the patent following it would have been a conclusive determination that all the lands embraced within those lines were within the boundaries of the Mexican grant, and therefore not public lands to which the railroad grant only could attach. It would seem plain, therefore, that

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until the contested question of survey was decided it could not be known whether the lands involved in the contest were public or private lands; and until such decision became final, lands so involved were *sub judice* and not public lands within the meaning of the railroad grant act, according to the ruling in the cases referred to, as I understand them.

It results from these views that in case No. 88 there should be a decree dismissing the bill without costs, and in the consolidated cases Nos. 67, 68, and 69 a decree in favor of complainant, in so far as concerns the tracts of land in controversy which were at the time of the grant to the Southern Pacific Railroad Company of March 3, 1871, within the claimed limits of the San Jose grant, and as concerns the remainder of the lands in controversy in the consolidated cases, a decree for the defendants, each party to pay its own costs.

SAWYER, Circuit Judge. After a careful consideration of the question, I am satisfied that those lands embraced in cases Nos. 67, 68, and 69, alleged to have been within the boundary of the rancho San Jose, and to have been *sub judice*, at the date when the railroad grant attached to the lands granted, were subject to the legislative grant. I have studied with great care the cases of *Newhall v. Sanger*, 92 U. S. 761; *Doolan v. Carr*, 125 U. S. 638; and *United States v. McLaughlin*, 127 U. S. 428, relied on, and I am unable to find anything in either of them requiring, or justifying, the exclusion of those lands from the operation of the grant. In my judgment, those lands, now in question, were not in any *just sense*, or in the sense contemplated in the decisions in those cases, *sub judice*, at any time after the decree of confirmation, defining by specific metes and bounds the precise lands confirmed, became final, even if they were so, which is at least, doubtful, at any prior time. That decree pointing out, specifically, the precise lands confirmed, forever settled the rights of the parties, and after it became final, there was no possible ground for claiming anything outside of those boundaries. None of these lands are within the boundaries designated in the decree, or within the exterior boundary of the juridical possession upon which the decree was based.

Indeed, as I understand the matter, they all lie from at least one to three miles from those boundaries, and could not by any possibility have been taken in by any survey, conforming to the decree, or have been lawfully included in any survey. After that decree became final the claimants might just as well have claimed land ten, fifteen, or more miles, as from one to three miles, distant. The decree settled the rights of the parties, and the limits of the land granted. And that is final. It could not, lawfully, be changed by the surveyor, or any other authority. In the language of the supreme court, in *United States v. Halleck*, 1 Wall. 455, 456: "*The decree is a finality, not only on the question of title, but as to the boundaries which it specifies.*" (Affirmed, *United States v. Billing*, 2 Wall. 448; *Higuera v. United States*, 5 Wall. 834; *Dodge v. Perez*, 2 Sawy. 652.)

In the *Fossat Case*, 2 Wall. 649, the supreme court held that: "If a California land claim has been confirmed by a decision of the district court under the act of March 3, 1851, and decision of confirmation, fixing the boundaries of the tract, stands unreversed, a survey under it is the execution of that decree, and must conform to it in all respects." Now in this case, the decree of confirmation which stands unreversed "*fixes the boundaries*" of the grant, and the survey under it is not a continuation of the litigation, but "*the execution of that decree*"; and no lands outside the specific boundaries so fixed and established, no matter what the confirmees may claim, could lawfully be included in the survey, or patent. The rights of the parties are finally settled, and the land to which the confirmees are entitled, irrevocably, designated, and distinctly pointed out.

The language of the decree of confirmation is, substantially, identical with that of the juridical possession, which was ratified and approved by the granting authorities of Mexico, and by its adoption in the decree by the courts of the United States, it forever settled the question of location between the United States and the claimants, and, thereby, the lands outside the boundaries ceased to be *sub judice*. All that remained to be done was to execute the decree, by finding the monuments designated, and run the lines between them in a form usual for insertion in United States patents. There was no discretion whatever

left in the surveyor, as there is in the case of a float. Those monuments, *and no others*, could be lawfully taken, and there was no possible ground for further claiming lands outside the boundaries so, specifically, designated, and pointed out. The language of the decree of confirmation is clear and unmistakable, and is as follows:—

“Commencing at the foot of a *black willow tree*, which was taken for a corner, and between the limbs of which a dry stick was placed, in the form of a cross; thence westerly nine thousand seven hundred (9,700) varas to the foot of the hills called ‘Las Lomas de la Puente,’ taking for a landmark a large walnut tree on the slope of a small hill on the side of the road which passes from said ‘San Jose’ to the Puente, making a cut (*caldura*) on one of the limbs with a hatchet; thence northerly ten thousand four hundred (10,400) varas to the creek (*arroyo*) of San Jose, opposite a high hill, where a large oak was taken as a boundary, in which was placed the head of a beef, and some of its limbs chopped; thence easterly ten thousand six hundred (10,600) varas to the creek (*arroyo*) of San Antonio, taking for a landmark two young cotton-woods which stand near each other, on the bark of which crosses were made; thence southerly nine thousand seven hundred (9,700) varas to the place of beginning.”

There could not well be a more specific description of the corners and landmarks. There are four corners, consisting of certain trees, marked and carefully described, constituting the monuments as specifically described, as surveyors usually describe their monuments; and four straight lines for sides, forming very nearly a parallelogram; and such appears to be the shape of the land on the *deseño*. No other points or objects could be lawfully taken. Now the land included within these boundaries is the land confirmed, and no other. There was no further ground for litigation. All that was necessary to do was to find the monuments and run the connecting lines according to the description in the decree. Monuments of this kind may be destroyed, and it may become difficult to find them; but that is the misfortune of the parties interested. It does not appear that that was the case here. Monuments are often destroyed when planted by government surveyors in surveying the public

lands, and this occasions much trouble in after years, as this court has had frequent occasion to know, from litigation before it, as to boundaries of the public surveys and the location of the monuments, officially, planted by the United States surveyors.

In this case the record of the juridical possession was referred to in, and made a part of, the petition for confirmation filed before the land commissioners, as describing the lands for which confirmation was asked. Thus the claim made upon the record was for these specific lands within the boundaries prescribed by the juridical possession, and adopted in the final decree, *and no other*. It does not appear in the record that any claim was made before the board or court for lands outside these boundaries, or that there ever was any contest over lands outside the prescribed boundaries. The juridical possession was a ceremony analogous to livery of seisin at common law, and it defines specifically the lands granted. This juridical possession is, of itself, controlling as to the lands granted. (*United States v. Graham*, 4 Wall. 261, 262; *United States v. Pico*, 5 Wall. 539, 540.) In this case we have not only the juridical possession, but the decree confirming the grant in accordance with it, and with the claim of the petitioners, as shown by the record; and this decree, whether right or wrong, as we have seen, is final and conclusive. The case was not open, thereafter, to further contest, or claim for lands outside these boundaries. In my judgment, that claim for land outside ceased to be *sub judice*, if it ever was in that condition, at the date when this decree became final. After that no land outside of these prescribed boundaries could, lawfully, be included in the patent issued under the confirmation; and there was no longer any legitimate or substantial basis for any claim to such lands.

Newhall v. Sanger, 92 U. S. 761, and *Doolan v. Carr*, 125 U. S. 618, present cases entirely different from this. In the former, when the general map of the route was filed by the railroad company, the claim for confirmation of the Moquelamos grant, within the exterior boundaries of which the lands in dispute were situated, was still pending and undetermined. The grant was afterwards rejected as fraudulent. The *claim itself to the grant* was, undoubtedly, *sub judice*, for it was still pend-

ing, and *the validity of the claim* undetermined by the courts. It was held that the grant being still *sub judice* the lands were not embraced within the railroad grant. The case was decided upon a partial record in which all the facts did not appear. Afterwards, in *United States v. McLaughlin*, it appeared that the land claimed under the Mexican grant was for a certain number of leagues within the exterior boundaries containing a great many more leagues—a float; and it was held that, since there was ample land left to satisfy the grant, and the right of location was in the government, the surplus lands were subject to grant, and those within the purview of the railroad grant passed to the railroad company; and the court limited the rule as to lands *sub judice*, at the time of the railroad grant, to grants by name and grants by specific boundaries, in which *all the lands passed to the grantee*. (*United States v. McLaughlin*, 127 U. S. 428.)

So the case of *Doolan v. Carr*, 125 U. S. 618, did not present all the facts, and the court acted upon the hypothesis that the grant was one by name—the “rancho Las Pocitas” including all the lands within the indicated boundaries. It was substantially so alleged in the *offer of proof* (see p. 621), and such is the idea conveyed by the proofs offered as stated on pages 622 and 623. It does not appear in that record that the supreme court modified, as it did the decrees of the *board and of the district court*, and limited the confirmation to *two square leagues*, or that the exterior boundaries covered from ten to twelve square leagues—that it was, therefore, in fact, a mere float, a grant of quantity, within boundaries containing nearly six times the quantity confirmed. But all this appears in the subsequent case, involving lands in the same grant “Las Pocitas” (*United States v. Curtner*, *ante*, p. 535), the decision in which was concurred in by both the circuit justice and circuit judge, the former, with Justice Strong, having originally dissented in *Newhall v. Sanger*. The court in *Newhall v. Sanger*, doubtless supposed that the grant called “Moquelamos” was a grant by name, with definite boundaries. This clearly appears from what is said in *United States v. McLaughlin*, 127 U. S. 455, 456. Said the court among other things:

“There is really nothing in the decision of *Newhall v. Sanger*, in conflict with the views here expressed, *because the court did not have before it the case of a floating grant.*” (p. 456.) And in that case, the *validity of the grant itself* had not been decided when the railroad grant was alleged to have attached. And in *Doolan v. Carr*, the court supposed that “Las Pocitas” was a grant by name, including all land within the boundaries given, and acting upon this idea, as seems evident from what it said in 125 U. S. 631 and 632, and in the third head-note, pages 118, and 119, it considered, and perhaps, properly, too, the case to be still *sub judice* under its *loose and extremely vague general boundaries as described, until they should be properly and specifically determined.* The boundaries in both these cases were general, loose, and vague to the last degree, and much latitude in the exercise of discretion by the surveyor, must, necessarily, have been exercised. In those cases, until the survey had been made and approved, and the land granted located, the case was, perhaps, *sub judice*. The San Jose grant, now under consideration, *presents no such case.* It had been awarded to the claimants as long ago as 1857, by a final decree, which not only confirmed the grant, but pointed out the boundaries by specific corners carefully described, and courses connecting them, *which no surveyor could lawfully disregard, change, or modify*; and I find nothing in the cases cited to warrant me in saying, that, after that specific decree became final, either the grant or its boundaries were in any just or legal sense, or in the sense as used in the cases cited, *sub judice*. The grant was undoubtedly *sub judice*, from the filing of the petition till the entry of the final decree confirming and identifying the lands granted by specific metes, bounds, and monuments, clearly described.

Prior to the entry of that decree confirming the grant, a grant, like that in question, to the railroad company under the decisions in the cases cited, would not have taken effect, even if the grant were afterwards rejected as fraudulent, upon *lands confessedly within the specific boundaries* of the grant as described and claimed in the petition, it being a grant *covering all the lands within the boundaries.* But these lands now under consideration never were within the boundaries described in

the juridical possession, for which the petition was filed, and in the final decree, which follows literally the juridical possession. Like much of the land *claimed* to be within the Moquelamos grant, these lands were entirely outside the *exterior* boundaries of the grant. I doubt very much whether they ever were *sub judice*, although the lands described in the grant undoubtedly were. They were miles outside the boundaries described in the juridical possession and decree, and could in no way be lawfully brought within the grant. In *United States v. McLaughlin*, 127 U. S. 441, the main question was, “whether the land in question *was actually within the outside limits* of the pretended Moquelamos grant?” Had it not been, as a large part was found by the court not to be, *although so earnestly and vigorously claimed*, that ended the question. Now, in this case, the lands under consideration never were within the outside limits of the grant, as indicated by the juridical possession, and that ought to end the matter.

But the supreme court itself, in the case of *United States v. McLaughlin*, the *very last* case on the subject, has decided the point, substantially, that the mere *claim* that lands are within the boundaries of a grant *does not make them sub judice* even in a float, within the meaning of that phrase, as used by the court in the three cases cited. That decision *authoritatively* settles the point, and does not leave it open for further discussion. Nearly all the lands involved in that suit lay east of the Jack Tone road, which followed the line between sections 7 and 8. The complainants earnestly insisted that the eastern boundary of the Moquelamos grant was the Sierra Nevada Range, eighty miles distant, and if not that range, then, that Bear Mountain, twenty-four miles east of the Jack Tone road, was the narrowest eastern limit of the grant. The most of the testimony in that case, both by complainants and respondents, was introduced upon this single point to show the eastern exterior boundary of the grant, the complainants insisting that it was the Sierra Nevada Range, and if not that, then, at least, Bear Mountain, and the respondents, that it was the Jack Tone road. And the court opens the discussion on page 441 by saying that the first question is, “*whether the land in question was actually*

within the outside limits of the pretended Moquelamos grant?" Several pages are then devoted to discussing the evidence on this point, which was the great point of discussion in the case, and the court then concludes: "On the whole, we are satisfied that the *outside boundary limits of the Moquelamos grant, as called for in the grant itself*, do not extend east of the Jack Tone road, or the edge of the hills commencing near the same. *This result would dispose of the present case with regard to nearly all the land in question therein.*" (pp. 447, 448.) Thus, as to the great body of lands in question, the court put the decision expressly on the ground, that although within the boundaries, *as claimed, they were, in fact, outside the real boundaries of the grant.*

Then, the *mere claim* that the lands were within the boundaries of the grant did not make them *sub judice*, within the meaning of that term, as used by the court; for this point is wholly outside and independent of the distinction between floats and grants by specific boundaries or names, on which distinction the few lands west of the Jack Tone road were still given by the court to the railroad company as not coming within the decision of *Newhall v. Sanger*. It seems to me that there is no evading this authoritative decision; that a *mere claim* that lands are within the exterior boundaries of a grant, when not so in fact, does not make them *sub judice even in the case of a float*, much less in a grant with specific bounds, finally and irrevocably confirmed and fixed by such specific bounds.

I am, therefore, clearly of the opinion that these lands now under consideration were not *sub judice* in the sense as the terms are used in the cases cited when the railroad grant attached, and that the grant is valid and passed a good title.

On this point I regret to find that I cannot agree with my associate. On all the other points discussed by my associate, in the opinion now delivered, I fully concur with his views.

It has been suggested that the ruling on demurrer as to indemnity lands adopted in the opinion of my associate in which I concur, and being the lands in question, is inconsistent with the ruling in *Southern Pacific R. R. Co. v. Wiggs*, decided by me, and reported in 43 Fed. Rep. 333, and *ante*, page 568.

1891.]

Opinion of the Court—Sawyer, C. J.

When that case was decided the decision on demurrer in this case had not fallen under my notice. But the cases are not inconsistent and can well stand together. In that case the decision was not put upon the ground that the company's *title* attached to lieu lands at any time before the selection, but on the ground that under the special provision of that act they, as well as those within the primary grant, were withdrawn from pre-emption, and other disposition before provided for by law, and that, although the company's *title did not vest*, till selection, still that, until it had an opportunity to select, nobody else could acquire or initiate a pre-emption or other right, under existing laws. And that the pre-emption claim then in question was initiated and afterwards proved up and the patent issued, while the lands were withdrawn and not subject to sale as the laws then stood, except to the company, and while awaiting an opportunity for the company to select, and were not then subject to such disposition. Congress had power, had it seen fit to do so, to withdraw any lands from pre-emption without reference to other grants, and without conferring any rights upon another to the lands. But that act did not purport or attempt, nor could it have done so if attempted, to limit the power of Congress to make subsequent grants to such lands before any other right in them had vested; and the grant now in question was a subsequent one made by Congress itself, and as no other right had yet attached to the lands, it was in no way affected by the provisions for withdrawal from pre-emption and sale by the prior act. I concur with the district judge wherein he held on demurrer as follows: "To lands to which no title could attach prior to selection, I do not think the Atlantic and Pacific Company had, at the time of the grant to the Southern Pacific Company, a present, or prospective right. If it had such right to the particular lands in suit, it had the same right to all other lands to which the right of selection might have applied. And since, by the act making the grant, the Atlantic and Pacific Company was empowered to construct its road along the thirty-fifth parallel of latitude to the Colorado River, 'at such point as may be selected by the company for crossing, thence by the most practicable and eligible route to the Pacific' Ocean, the

present and prospective right of that company, prior to selection, might be applied to any public land situated between the Colorado River and the Pacific Ocean with equal propriety as to the particular lands in controversy here. The effect of such a holding would be to give the proviso as broad a scope as the granting clause to which it is appended."

The question whether the clause in the provision of section 23 in the act of 1871, "that this section shall in no way affect or impair the rights, present or prospective, of the Atlantic and Pacific Railroad Company, or any other railroad company," or any clause in the act of 1866, in view of all the facts of the case, defeats the grant to respondent as to those lands, which lie within the primary limits of the grant, does not arise in this case, and, therefore, need not be discussed. Yet, since there is an intimation, in the opinion of the district judge, upon the demurrer, although the question was not involved, and, consequently, there was but a partial consideration of the point; that such is the case I refer to it now for the purpose, only, of saying that I do not wish to be considered as acquiescing in that view. I shall not at this time decide or discuss that question, but leave it for full discussion and decision when the point properly arises.

Under the views expressed, and those of my associate on the other points discussed by him, in which I have concurred, and under the provisions of section 650 of the Revised Statutes of the United States, the bills, as to all the lands involved in the several cases before us, must be dismissed, and it is so order.

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ADMIRALTY.

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2. **TOWAGE—CONTRACT.**—The master of the ship, desiring to put her aground, agreed to pay libellant \$500 to tow her ashore. When the ship in tow reached a suitable place, her port anchor was let go, and the tug ordered to go astern and draw the stern of the ship to the shore, so that she could be secured in that position, while another of libellant's tugs carried out a kedge anchor. *Held*, that the contract of towage did not end when the port anchor was cast, but when the ship was placed in the proper position to be put aground. *Ib.*
3. **COMPILATION OF 1887.**—The compilation of the general statutes of Oregon, provided for in the act of February 26, 1885, and published in two volumes, with the certificate of the governor, of August 9, 1889, prefixed thereto, as required by said act, is *prima facie* evidence of the general statutes of Oregon, then in force, which may be cited and referred to, in both judicial and legislative proceedings, by the chapter, title, and section as therein arranged, set down, and enumerated. *The Borrowdale*, 109.
4. **REVISION AND AMENDMENT OF STATUTES UNDER SECTION 22 OF ARTICLE 4 OF THE CONSTITUTION.**—An act amendatory of another act should contain the sections of the latter act as amended, at full length, but it need not also contain such section as unamended; the act amended need not be published at full length in the amendatory act unless the amendments thereto amount to a revision of the same, by producing some change in every section thereof. *Ib.*
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8. **IDEM—TIME OF FILING PETITION—RULE 54.**—The petition or libel may be filed in the district court before, as well as after, suit commenced to recover damages. *Ib.*
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12. **EVIDENCE—COMPETENCY OF.**—The admissibility or competency of evidence in a legal proceeding pertains to the remedy, and is governed by the *lex fori*, and therefore a clause in the British shipping act of 1854, making certain entries in the official log-book competent evidence in all courts, does not make them so in the courts of any other country. *Ib.*
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15. **PILOTS—PORTS.**—A vessel, lying under the protection of Point Fermin, which is a well-defined headland on the northerly side of the bay of San Pedro, will be held to be within that bay in the absence of any legally defined limits thereof. *Weldt v. The Howden*, 229.
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18. **COLLISION.**—Libel dismissed for want of satisfactory proof. The sinking of the dredger was caused by collision with the barge in tow of respondent's tug. *Lambert v. Freese*, 380.
19. **SALVAGE—AWARD—EXTINGUISHMENT OF FIRE.**—In the early morning, fire from a burning warehouse was communicated to a wooden vessel and a steel ship fastened to the wharf, and on attempting to run the latter into the stream the tide took it along-side the former, and the two became entangled by falling rigging. A steamboat built of inflammable material, and loaded with broom-corn, after spreading tarpaulins, and stationing a man with a hose on her deck, was attached to the steel ship, and drew both vessels into the stream, where they were separated by the tide, when the steel ship was drawn on the flats. The steamboat did not assist in putting the fire out, which was done by tug-boats which arrived some hours afterwards from a distant point, but by separating the vessels, prevented the forepart of the ship taking fire. The tugs M. and S. played on the after-part of the ship, and after the deck was cooled, down the hatches. The R. made fast to the forward part, where there was danger from floating wreckage, and after extinguishing the fire on deck, attacked that in the

- between decks; and her men incurred great danger in descending the hatches to extinguish fire in the cargo of wheat. The M. had one hundred feet of hose, the S. two hundred, and the R. twelve hundred, and played five streams. One hundred thousand dollars' worth of property was saved. *Held*, that fourteen thousand five hundred dollars should be awarded as salvage—four thousand five hundred dollars to the steamboat, three thousand dollars to the tugs M. and S., and seven thousand dollars to the tug R. *Spreckels v. The Kenilworth*, 382.
20. **COLLISION—BETWEEN STEAM AND SAIL—EVIDENCE.**—A steamer and sloop were approaching nearly end on, the former going ten miles an hour, the latter six. The master and watchman of the steamer testified that the sloop was first seen three miles distant, and one point on their starboard bow, both lights being visible; that the steamer kept her course for two or three minutes, when, the sloop's red light disappearing, they altered their course for a few minutes, when the sloop being about one hundred yards away, changed her course, and came up into the wind, exposing her red light; that the steamer stopped and backed, but was struck on her starboard bow by the sloop's port. The three persons on the sloop denied having changed their course. *Held*, that the steamer had not sustained the burden on her to show that the collision was not her fault. *Mazeas v. The J. D. Peters*, 434.
21. **MARINE TORT—LIEN FOR.**—A person injured by a vessel on a navigable water of the United States has a lien on such vessel for the damage sustained thereby. *The Steamship Oregon*, 440.
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25. **INTERVENTION IN ADMIRALTY.**—Any person may intervene in a suit in admiralty *in rem* for his interest; and he may do so, notwithstanding the *res* has been delivered to a claimant on a stipulation in a certain sum to abide and perform the decree, the stipulation, as far as it goes, standing for the United States. *Ib.*
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BANKRUPTCY.

1. **BANKRUPTCY.**—Where an action was brought on a decree of the court obtained by an assignee in bankruptcy against one H. for a fraudulent conversion of the assets of a bankrupt firm, and subsequently to the rendering of the decree separate suits had been commenced against two co-conspirators in the perpetration of the fraud, in one of which judgment had been obtained by the assignee and the other of which was pending, and the assignee entered into an arrangement with the co-conspirators to discontinue further proceedings against them on the payment by them of a large sum of money, which being made, he consented to an order setting aside and vacating the judgment obtained against one of them, and dismissed the suit against the other. *Held*, that the money so received should be credited on the original decree against H. in part satisfaction and payment thereof, and this notwithstanding that the assignee had obtained from the co-conspirators, a declaration or statement in writing that the money paid by them was not paid "or received, in payment or satisfaction, or on account of any claim, demand, or cause of action set forth or alleged in plaintiff's complaint." But that the moneys were paid "to re-imburse the plaintiff for the costs, expenses, disbursements, and attorney and counsel fees incurred by him in the above-entitled action." *Shainwald v. Lewis*, 23.

CHINESE.

1. **WIFE AND CHILDREN OF CHINESE MERCHANT.**—The wife and children of a Chinese merchant, who is entitled under article 2 of the treaty of 1880, and section 6 of the act of 1884, to come within and dwell in the United States, are entitled to come into the country with him or after him, as such wife and children, without the certificate presented in said section 6. *In re Chung Tsy Ho*, 531.

See **HABEAS CORPUS.**

CONSTITUTIONAL LAW.

1. **UNITED STATES COURTS—JURISDICTION—HABEAS CORPUS.**—Under the provisions of sections 751 to 753 of the Revised Statutes, the courts of the United States and their judges have jurisdiction, upon a writ of habeas corpus, to inquire into the cause of the imprisonment of the petitioner; and if, upon such inquiry, he is found to be "in custody for an act done or omitted, in pursuance of a law of the United States," he is entitled to be discharged, no matter from whom, or under what authority, the process under which he is held may have issued; the constitution, and laws of the United States made in pursuance thereof, being the supreme law of the land. *In re Neagle*, 232.
2. **IDEM.**—In the exercise of this jurisdiction there is no conflict of authority between the state and the United States. The laws of the United States being the supreme law of the land, the authority of the state in such cases is subordinate, and that of the United States paramount. *Ib.*
3. **CONSTITUTIONAL LAW—STATE LAWS.**—A state law which contravenes a valid law of the United States is void. In legal contemplation, there can no more be two valid conflicting laws, operating upon the same subject-matter, at the same time, than, in physics, two bodies can occupy the same space at the same time. *Ib.*
4. **IDEM—LAWS OBSTRUCTING UNITED STATES OFFICER.**—The United States is a government with authority extending over the whole territory of the Union, acting upon the states, and the people of the states. While limited in the number of its powers, it is, so far as its sovereignty extends, supreme. No state can exclude it from exercising those powers, obstruct its authorized officers, against its will, or withhold from it the cognizance of any subject which the constitution has committed to it. *Ib.*

5. **IDEM.**—The constitution and laws of the United States, as to those matters wherein they are supreme, extend over every foot of the territories of the United States, and the jurisdiction of their courts to enforce rights derived thereunder is as extensive as the territory to which they are applicable. *Ib.*
6. **IDEM—RIGHT OF NATIONAL GOVERNMENT TO PRESERVE ORDER.**—The national government has power to command obedience to its laws, to preserve order, and to keep the peace, in matters affecting national interests, and no person or power in the land has a right to resist or question its authority so long as it keeps within the bounds of its jurisdiction. *Ib.*
7. **IDEM—PROTECTION OF JUDGES.**—It is within the power of the government of the United States to protect all the agencies and instrumentalities necessary to accomplish the objects and purpose of that government. It is therefore empowered to protect the lives of the judges of its courts from assault and assassination, on account of their judicial decisions, by desperate, disappointed litigants, not only while actually holding court, but while such judges are traveling through their circuits for the purpose of holding courts at the different places therein appointed by law for that purpose. *Ib.*
8. **POWERS OF UNITED STATES MARSHAL.**—An assault upon, or an assassination of, a judge of the United States court, while engaged in any matter pertaining to his official duties, on account or by reason of his judicial decisions or action in performing his official duties, is a breach of the national peace affecting the authority and interests of the United States, and within the jurisdiction and power of the United States marshal or his deputies to prevent, as a peace officer of the national government. *Ib.*
9. **IDEM.**—By section 788 of the Revised Statutes, and the several provisions of the statutes of California prescribing the duties of sheriffs, by that section made applicable to marshals, the United States marshal is made a peace officer, and as such, he is authorized to preserve the peace, so far as a breach of the peace affects the authority of the United States, and obstructs the operations of the government and its various departments. The courts of the United States must be enabled fully to perform all the functions imposed upon them by the constitution and laws, without hindrance or obstruction, and they have the inherent power to protect themselves by and through their executive officers, under the direction and supervision of the attorney-general and the President, against obstruction and hindrance in the performance of their judicial duties. *Ib.*
10. **IDEM—HOMICIDE BY MARSHAL—HABEAS CORPUS—JURISDICTION.**—Where a deputy United States marshal, acting under instructions from his superior officers—the United States marshal and the attorney-general—in protecting the life and person of a justice of the supreme court of the United States from a murderous assault, made on account of his judicial decisions, at the hands of a dissatisfied litigant, finds it necessary to take the life of the assailant, and is arrested by the state authorities, and held upon a charge of murder for such act, the United States circuit court may, upon habeas corpus, discharge such United States officer from the custody of the state authorities, upon it being shown that the homicide was necessary, or that it was reasonably apparent to the mind of the deputy-marshal, at the time and under the circumstances surrounding him, that the killing was necessary in order to protect and defend the justice from great bodily injury, or to save his life. *Ib.*
11. **IDEM.**—The homicide in such case, if an offense at all, is an offense under the laws of the state, and only the state can deal with it in that aspect. It is not claimed to be a crime punishable under the laws of the United States. But the homicide, when necessarily committed by a deputy-marshal in the performance of his duty, in protecting the life and person of a justice of the United States supreme court from assault and violence because of his judicial decisions, is an “act done in pursuance of a law of the United States,” and is not and cannot,

therefore, be an offense against the laws of the state, no matter what the statute of the state may be; the laws of the United States being the supreme law of the land. *Ib.*

12. **IDEM.**—It is the exclusive province of the United States courts to ultimately and conclusively determine any question of right, civil or criminal, arising under the laws of the United States. It is therefore the prerogative of the national courts to construe the national statutes, and determine, upon habeas corpus, whether a homicide for which the petitioner is charged with murder by the state authorities was the result of an "act done in pursuance of a law of the United States;" and, when that question has been determined in the affirmative, the prisoner will be discharged, and the state has nothing more to do with the matter. *Ib.*
13. **IMPLIED POWERS OF THE NATIONAL GOVERNMENT.**—All the law of the United States is not specifically expressed in statutory enactments. Many powers are necessarily inherent in the various departments of the government, without which the government could not perform functions necessary to its existence. The exercise of such powers is, nevertheless, in pursuance of the laws of the United States. *Ib.*
14. **IDEM — STATUTES — CONSTRUCTION.**—When statutes confer powers, impose duties, and provide for the accomplishment of various objects, they are necessarily couched in general terms, but they carry with them, by implication, all the powers, duties, and exemptions necessary to accomplish the objects thereby sought to be attained. *Ib.*
15. **ACTS OF HEADS OF GOVERNMENTAL DEPARTMENTS.**—The acts of the heads of departments of the United States government, in the line of their duties, are, in contemplation of law, the acts of the President himself. *Ib.*
16. **HOMICIDE — KILLING IN DEFENSE OF ANOTHER.**—A party resisting a murderous assault, where several lives are in danger, being in the best position to judge as to the dangers and requirements of the occasion, is the one to determine when the proper moment has arrived, in self-defense, to slay his assailant, in order to be justified by the law; and if he acts in good faith, with reasonable judgment and discretion, the law will justify him, even though he errs. Where several lives are in danger from the assault of a powerful, infuriated, desperate man, common prudence would dictate that the party assailed should fire a second or two too soon, rather than a fraction of a second too late. *Ib.*

COPYRIGHT.

1. **COPYRIGHT — INFRINGEMENT.**—Complainant sold a copyright insurance map to H. & M., who employed defendants to correct it, by reason of changes from time to time in buildings, etc., affecting risks. Defendants, in making such corrections, used pasters on complainant's map, and retraced portions of said map, and in some instances reproduced whole sheets of said map, by relithographing it. *Held*, that while defendants could correct the map by putting thereon their pasters of such corrections, nevertheless it was an infringement to retrace any material part of complainant's map, or to reproduce any material part thereof in making such corrections. *Sanborn M. & P. Co. v. Dakin P. Co.*, 75.
2. **IDEM — INJUNCTION — ACCOUNTING.**—Complainant, in such case, is entitled to an interlocutory decree enjoining further infringements, and to an accounting for damages. *Ib.*

CORPORATIONS.

1. **CORPORATIONS — ACTIONS BY AND AGAINST.**—The Code of Civil Procedure of California, section 383, provides that "when two or more persons, associated in any business, transact such business under a common name, whether it comprises the

names of such persons or not, the associates may be sued by such common name.' *Held*, that a bill to enjoin interference by defendants with complainant's alleged right to divert water from a stream, against the "South Fork and Sunnyside Division of the Santa Ana River," which, it appears, is an association formed and existing pursuant to the laws of California, is sufficient, without making the owners and stockholders thereof parties. *Hewitt v. Storey*, 317.

CORPORATION, POWERS OF.

See TRUST.

CRIMINAL LAW.

1. **INDICTMENT AND INFORMATION—PLEA IN ABATEMENT—DEMURRER.**—Where a plea in abatement to an indictment alleges facts contrary to the record, or which could be proven only by the testimony of the grand jurors disclosing their proceedings or impeaching their findings, a demurrer to the plea cannot be regarded as admitting the truth of such allegations, but will be considered as an objection or exception to the filing or allowance of the plea. *United States v. Terry*, 44.
2. **IDEM—IMPEACHING RECORD BY PLEA.**—Such allegations cannot properly be inquired into by plea in abatement, but the inquiry must be addressed to the discretion of the court, by suggestion or motion, and it will be allowed only in rare and extraordinary cases, where the matters, if true, work a manifest and substantial injury to the defendant. *Ib.*
3. **IDEM—CONDUCT OF GRAND JURY—OMISSION TO READ INDICTMENT.**—The fact that after a large number of witnesses had been examined by the grand jury, and the district attorney had been instructed to prepare indictments against defendants, the jury dispensed with the reading of the indictments, and returned them into court without knowing their exact contents, because of the statement made to them by the attorney that it would take three hours to read them, and that the supreme court justice wanted to leave, and wanted the indictments found before he left, affords no ground for setting aside the indictments. *Ib.*
4. **IDEM—PRESENCE OF THE DISTRICT ATTORNEY IN THE JURY-ROOM.**—In the United States district court the mere fact that the district attorney was present during the expression of opinion of the grand jury upon the charge in the indictment, and during their voting thereon, is at most an irregularity, which, in the absence of averment of injury or prejudice to defendant, is a matter of form and not of substance. *Ib.*
5. **IDEM—REFUSAL TO SUBPOENA WITNESSES FOR ACCUSED.**—In the United States district court the mere refusal of the district attorney to summon witnesses for the accused, at the request of the grand jury, furnishes no ground for setting aside the indictment. *Ib.*
6. **CRIMINAL LAW—SENTENCE—COMMUTATION FOR GOOD BEHAVIOR.**—The act of Congress, March 3, 1875, provides that a United States prisoner, confined in execution of any sentence in a prison of any state or territory, which has no system of commutation for its own prisoners, shall have a deduction of five days in each month in which no charge of misconduct shall be sustained against him. The Revised Statutes of the United States, section 5544, provides that in other cases such prisoner shall be entitled to the same credits applicable to other prisoners. *Held*, that as an act of California, amended March 14, 1881, provides for commutation for such prisoners only as are confined in the state prisons for terms of one year and over, a United States prisoner sent to the county jail for six months is entitled to no credits for good behavior. *United States v. Goujon*, 211.
7. **PERJURY—INDICTMENT.**—An indictment for perjury which charges that defendant took an oath before Judge R. in the United States district court, in open

by the purchaser with its terms, though such certificate is made by the state statutes *prima facie* evidence of title. *Sweatt v. Burton*, 469.

5. **EJECTMENT — PLEADING — COSTS AND DAMAGES.** — In ejectment for land of which the several defendants had taken possession, each claiming a certain portion, where some of the defendants enter a disclaimer, and others, with plaintiff's consent, agree to a judgment against them without costs or damages, the remaining defendants, who only plead the general issue, are, on a general verdict against them, liable for all the costs and damages. *Bell v. Foxen*, 499.
6. **IDEM — POSSESSION.** — Ejectment lies against persons who have entered on land, and claim possession adverse to the true owner, though they are not personally in possession at the commencement of the action. *Ib.*

See PUBLIC LANDS.

EJECTMENT AND EVIDENCE.

See PUBLIC LANDS.

EQUITY.

1. **EQUITY — JURISDICTION — ADEQUATE REMEDY AT LAW.** — Bills to have an adjustment of a loss under several insurance policies declared void for fraud, and to restrain actions thereon filed by the several insurance companies, would not avoid multiplicity of suits; and they are not bills for discovery, defendant being a corporation, and its officers not being parties, and answers on oath being waived, and the testimony being obtainable by examining the persons having knowledge as witnesses. The companies have a plain, adequate, and complete remedy at law, and suits in equity, therefore, under Revised Statutes, section 723, are not maintainable. — *M. F. A. Co. v. S. C. H. & A. Works*, 21.
2. **EQUITABLE MORTGAGE.** — A written agreement for security on certain property for the payment of a debt is in equity a mortgage, and will be enforced as such against all parties to the agreement, and those who have notice of it. *Gest v. Packwood*, 131.
3. **IDEM.** — R. gave his notes to P. and C. in payment on the purchase of a mining ditch and grounds, and agreed in writing with them that if such notes were not paid when due, he would reconvey the property to them as security for their payment; the notes not being paid, R. gave C. and P. a lease of the property, with a right to apply the net profits and proceeds from year to year on these notes. *Held*, (1) that the agreement to give security being in equity a mortgage, the lease, with a pledge of the rents and profits, was accepted as a fulfillment of the agreement, and the agreement and lease taken together created a continuous lien on the property in favor of the payee of the notes or his assigns, from the date of the agreement; (2) that the assignment of the rents and profits of the property to the lessees for the payment of the notes created a lien on the body of the property, which, in case the rents and profits are insufficient to pay the same, may be enforced in equity; (3) during the possession under this lease the lessees were not authorized to charge the property with the expense of operating or improving it, and if the expenditures in any one year exceeded the receipts, such excess was their personal debt. *Ib.*
4. **STATUTE OF LIMITATIONS.** — In the consideration of purely equitable rights and titles courts of equity are not governed by the statute of limitations. *Ib.*
5. **EQUITABLE INTEREST IN LAND.** — The sale of an equitable interest in land is not the mere assignment of a right of action thereabout, and in a suit in a national court by the vendee, to establish his right therein, it is not material what the citizenship of his vendor is. *Ib.*
6. **JUDGMENT OF A STATE COURT.** — The plaintiff in a decree in a state court, given in a suit to enforce the lien of a mortgage on real property, is a proper party to

- a suit in a national court to enforce an alleged prior lien on the same property, and in such suit the validity and effect of such mortgage and decree may be inquired into and determined as an original question. *Ib.*
7. **EQUITY—JURISDICTION—FRAUD—CANCELLATION OF INSTRUMENTS.**—There may often be a remedy, at law, for fraud, but where it is desirable to remove a cloud from the title to real estate by decreeing a cancellation of a fraudulent conveyance, that remedy, being more complete, courts of equity will take jurisdiction, and grant appropriate relief. *Teall v. Slaven*, 364.
 8. **IDEM—LIMITATION OF ACTIONS—DISCOVERY OF FRAUD.**—In providing for limitations of actions founded on fraud, the legislature has adopted the principle established by courts of equity, that the cause of action shall not be deemed to have accrued until the “discovery of the facts constituting the fraud;” and to ascertain what conditions constitute a discovery, within the meaning of such statutes, the principles established in equity jurisprudence, whence the idea was derived, must be applied. *Ib.*
 9. **IDEM—NOTICE.**—The established principles as to the discovery of fraud are, that the party must be diligent in making inquiry; that means of knowledge are equivalent to knowledge; that a clue to the facts, which if diligently followed would lead to a discovery, is, in law, equivalent to a discovery. *Ib.*
 10. **IDEM—RECORD OF FRAUDULENT DEED.**—Where a deed alleged to be fraudulent, bearing evidence of fraud upon its face, has been duly recorded upwards of thirty years, it affords just as strong evidence of fraud to the parties defrauded, as it does to subsequent purchasers. As to the parties defrauded, the question, of what the record imparts knowledge, is not, as in the case of subsequent purchasers, a question of statutory constructive notice, but of diligence. *Ib.*
 11. **IDEM—PLEADING.**—Where a bill to annul a conveyance on the ground of fraud is filed, more than thirty years after the performance of the acts of fraud complained of, and, in order to bring the case within the statutory exception, it is alleged that “the acts constituting the fraud” have only been discovered within three years before the filing of the bill, it is, also, necessary to set forth in the bill, *specifically*, what the impediments were to an earlier prosecution of the claim; how the complainant came to be so long ignorant of his alleged rights; the means used by the respondent to keep him in ignorance, and how he first came to a knowledge of his rights. *Ib.*
 12. **IDEM—LACHES—NON-RESIDENCE.**—The non-residence and continued absence of the complainant from the state does not excuse a want of diligence in ascertaining his rights. *Ib.*
 13. **IDEM—FACTS IN SUIT.**—It is alleged in the bill, that T., a citizen and resident of New York, owning land in California, executed a power of attorney to D., to take exclusive possession and control of the same, and to sell and convey it at his discretion, which power of attorney was duly recorded and remained unrevo-
 ked till the death of T., on August 12, 1857; that after the death of T., on September 17, 1857, D., by virtue of said power of attorney, executed in the name of D. a conveyance expressing a consideration of five thousand dollars, to R., of a large amount of said real property situated in the city of San Jose, the said conveyance bearing date August 1, 1857, eleven days prior to the death of T.; that on the same day, for a like consideration expressed, R. conveyed the same property to D., by deed bearing the same date; that said conveyances were made without consideration, and for the fraudulent purpose of enabling D. to appropriate said property of T. to his own purposes; that said conveyances were acknowledged on September 17, and recorded on October 3, 1857; that the numerous respondents are grantees direct, and mesne, from D., and that they purchased with a knowledge of the title of T.; that D. in his lifetime, and respondents, and their grantors, since D.’s death in 1876, concealed these fraudulent acts from complainants, a portion of the heirs of T., who have always lived in the state of New York and never have been in California, and that they did

not discover these fraudulent acts until some time in the year 1887, a short time before the commencement of this suit. *Held*, (1) that the suit is barred by the statute of limitations of California; (2) that the cause of suit is stale, and will not be enforced within the established principles of equity jurisprudence; (3) that during the thirty-two years that have elapsed since the death of T., and the fourteen years since the death of D., presumably the only parties who knew their exact relations to each other, and to this land, no sufficient diligence has been exercised by complainants to preserve their right of suit; and (4) that the impediments to a prosecution of the rights of complainants, how they were so long ignorant of them, the means of concealment adopted by respondents, and how complainants first came to a knowledge of their rights, are not sufficiently set out in the bill. *Ib.*

14. **CLOUD UPON PLAINTIFF'S TITLE.**—A patent issued in the name of the United States to a pre-emptor, entering upon these lands subsequent to the order of withdrawal, is erroneously issued, without authority of law, and is void. The existence of such a patent is a cloud upon the complainant's title. It embarrasses the assertion of complainant's rights, and prevents it getting a patent to the same land to which it is entitled. These circumstances constitute ground for equitable relief. A patent so issued to a pre-emptor is void, and the using of it should be perpetually enjoined. *Southern Pacific R. R. Co. v. Wiggs*, 568.
15. **DECISION OF SECRETARY OF INTERIOR NOT CONCLUSIVE UPON QUESTIONS OF LAW.**—Where the secretary of the interior, acting upon a known and recognized state of facts, draws therefrom an erroneous conclusion of law, and, in pursuance of such erroneous conclusions, issues a patent to a party not entitled thereto, his action is not conclusive, but is subject to review and reversal by the courts. *Ib.*
16. **SUIT AGAINST A STATE.**—A suit by a citizen of California, to enjoin the persons constituting the board of land commissioners of the state of Oregon from selling certain swamp lands, claimed by the plaintiff, as forfeited to the state for non-compliance with a condition of a former sale of the same lands by the state, to the plaintiff's grantor, is not a suit against the state of Oregon, it appearing that the legislation under which the defendants claim the right to act is unconstitutional and void, because it impairs the obligation of the contract of the state with such grantor. *McConnaughey v. Pennoyer*, 584.
17. **CONTRACT FOR SALE OF SWAMP LANDS.**—An application for the purchase of swamp lands under section 3 of the act of October 26, 1870, for the selection and sale "of swamp lands, from the date of its receipt and filing by the land commissioner, constitutes a contract between the state and the applicant for the sale to the latter of the tract or tracts therein mentioned, with the right to the immediate possession thereof; and on the performance of the conditions subsequent of payment and reclamation, within the terms and requirements of said section, the applicant or his assigns is entitled to a patent therefor. *Ib.*
18. **STATUTES OF OCTOBER 18, 1878, AND FEBRUARY 16, 1887.**—Section 9 of the act of 1878 does not, when fairly construed, include an application for the purchase of swamp land under the act of 1870, when there is no default in the payment of the twenty per centum of the purchase price as provided in said act of 1870; but if it does include such a case then it is unconstitutional and void, as impairing the obligation of the contract of the state with the applicant, which gave him until ninety days after the publication of the notice of the filing of the map of such lands in the office of the clerk of the county in which they lie to make such payment; and section 1 of the act of 1887, which declares all certificates of sale of swamp lands void on which the twenty per centum of the purchase price was not paid prior to January 17, 1879, is, in the case where the twenty per centum was paid when due, according to contract of the sale, whether before or after said day in 1879, unconstitutional and void for the same reason. *Ib.*

19. **CLOUD ON TITLE.** — A resale and conveyance of a tract of swamp land under the act of 1887, before sold by the state, under the act of 1870, on the ground that it had reverted to the state for the failure to pay the twenty per centum of the purchase price within the time required by law, would cast a cloud on the title of the purchaser or his assignee under the act of 1870. *Ib.*
20. **MULTIPLICITY OF SUITS.** — The prevention of a multiplicity of suits is an acknowledged head of equity jurisdiction, and this suit is clearly maintainable on that ground. *Ib.*
21. **SUIT AGAINST A STATE.** — This is not a suit against the state of Oregon or its authorized agents or representatives, but against the defendants, claiming to act as such, but without authority of law. The cases of *In re Ayers*, 123 U. S. 413, and *Hans v. Louisiana*, 134 U. S. 1, considered and distinguished from this. *Ib.*
22. **PATENT — INFRINGEMENT — PRELIMINARY INJUNCTION.** — In an action for infringement, brought only a few days before the expiration of the patent, it appeared that the invention was made and patented while the patentees were in the employment of defendant, though they soon afterwards left it; that defendant had, with plaintiffs' knowledge and approval, used the invention prior to the issue of the patent, and such use had continued to the commencement of the suit, without any express contract for compensation, though one of the patentees had notified defendant's president that, after he left its employment, defendant must pay for the use of the invention at the same rate that others paid. *Held*, that there was no ground for equitable interference to restrain such use for the few remaining days of the life of the patent by preliminary injunction. *Keyes v. Eureka Con. Manuf. Co.* 615.
23. **IDEM — SUIT FOR ROYALTIES — NATIONAL JURISDICTION.** — The only ground of equitable jurisdiction being relief by injunction, and patent having expired before defendant was required to answer, so that no injunction could have been granted on final decree, the only remaining cause of action, being for royalties under an implied license for the use of the invention after the notice, is purely legal, and, in the absence of a proper showing as to citizenship, there is no element of national jurisdiction, and the bill must be dismissed. *Ib.*

• See PATENTS AND PATENT RIGHTS.

EVIDENCE OF STATUTES.

1. **COMPILATION OF 1887.** — The compilation of the general statutes of Oregon, provided for in the act of February 26, 1885, and published in two volumes, with the certificate of the governor, of August 9, 1889, prefixed thereto, as required by said act, is *prima facie* evidence of the general statutes of Oregon, then in force, which may be cited and referred to, in both judicial and legislative proceedings, by the chapter, title, and section as therein arranged, set down, and enumerated. *The Borrowdale*, 109.
2. **REVISION AND AMENDMENT OF STATUTES UNDER SECTION 22 OF ARTICLE 4 OF THE CONSTITUTION.** — An act amendatory of another act should contain the sections of the latter act as amended, at full length, but it need not also contain such section as unamended; the act amended need not be published at full length in the amendatory act unless the amendments thereto amount to a revision of the same, by producing some change in every section thereof. *Ib.*
3. **SUBJECT-MATTER OF ACT — EXPRESSION THEREOF IN TITLE.** — An act entitled merely an act to amend a certain section of the Compilation of 1887 is void, for want of expression of the subject of the same in the title thereof; but an act entitled an act to amend an act relating to pilotage purports itself to be an act relating to pilotage, and the subject thereof is therefore sufficiently expressed in the title. *Ib.*

GRAND JURORS, CONDUCT OF.

See CRIMINAL LAW.

HABEAS CORPUS.

1. **HABEAS CORPUS—APPEAL—DEFECTIVE RECORD—SECOND APPLICATION TO ANOTHER JUDGE.**—Where a petitioner for a writ of habeas corpus appeals to the supreme court of the United States from a judgment of the circuit court denying his application, having omitted voluntarily from the record a material portion of his case, he is not at liberty, after the judgment is affirmed, to renew his application before another court or justice of the United States, upon the same record, with the addition of the matter omitted, without obtaining leave for that purpose from the supreme court. The question would be different if subsequently occurring events had changed the situation of the petitioner so as to present a new case for consideration. How far a decision by one justice or court denying an application for a writ of habeas corpus can be deemed *res judicata*, upon the petitioner's right to the writ on another application before another justice or another court, considered. *In re Cuddy*, 171.
2. **PRISON—PENITENTIARY, MEANING OF.**—The words "any prison or penitentiary," in the act of March 3, 1875 (1 Sup. Rev. Stats. 184), means state prison or penitentiary, and does not include county jails, or places employed for temporary confinement, or confinement for short periods for petty offenses. *In re Corcoran*, 178.
3. **ACT OF MARCH 3, 1875 (1 Sup. Rev. Stats. 184), construed.** *Ib.*
4. **HABEAS CORPUS—CONSPIRACY—JUSTICE OF UNITED STATES SUPREME COURT UNDER ARREST—WHEN ENTITLED TO BE DISCHARGED.**—Where a judicial officer of the United States is held in custody upon a warrant issued by a justice of the peace of a state, charging him with a felony, the sworn allegation of the officer in his petition, that he believes that the issue of said warrant and his detention thereunder are in execution of a conspiracy to prevent him by force and intimidation from discharging the duties of his office thereafter, and to injure him in his person on account of the lawful discharge of his duties previously, by removing him to a place where he can be subjected to indignities and humiliation, and where the conspirators may compass his death, is sufficient to authorize the issue of a writ of habeas corpus by a court of the United States, to inquire into the legality of such warrant and the detention of the petitioner. *In re Field*, 193.
5. **UNITED STATES COURTS—JURISDICTION—HABEAS CORPUS.**—Under the provisions of sections 751 to 753 of the Revised Statutes, the courts of the United States and their judges have jurisdiction, upon a writ of habeas corpus, to inquire into the cause of the imprisonment of the petitioner; and if, upon such inquiry, he is found to be "in custody for an act done or omitted, in pursuance of a law of the United States," he is entitled to be discharged, no matter from whom, or under what authority, the process under which he is held may have issued; the constitution, and laws of the United States made in pursuance thereof, being the supreme law of the land. *In re Neagle*, 232.
6. **IDEM.**—In the exercise of this jurisdiction there is no conflict of authority between the state and the United States. The laws of the United States being the supreme law of the land, the authority of the state in such cases is subordinate, and that of the United States paramount. *Ib.*
7. **CONSTITUTIONAL LAW—STATE LAWS.**—A state law which contravenes a valid law of the United States is void. In legal contemplation, there can no more be two valid conflicting laws, operating upon the same subject-matter, at the same time, than, in physics, two bodies can occupy the same space at the same time. *Ib.*

8. **IDEM—LAWS OBSTRUCTING UNITED STATES OFFICER.**—The United States is a government with authority extending over the whole territory of the Union, acting upon the states, and the people of the states. While limited in the number of its powers, it is, so far as its sovereignty extends, supreme. No state can exclude it from exercising those powers, obstruct its authorized officers, against its will, or withhold from it the cognizance of any subject which the constitution has committed to it. *Ib.*
9. **IDEM.**—The constitution and laws of the United States, as to those matters wherein they are supreme, extend over every foot of the territories of the United States, and the jurisdiction of their courts to enforce rights derived thereunder is as extensive as the territory to which they are applicable. *Ib.*
10. **IDEM—RIGHT OF NATIONAL GOVERNMENT TO PRESERVE ORDER.**—The national government has power to command obedience to its laws, to preserve order, and to keep the peace, in matters affecting national interests, and no person or power in the land has a right to resist or question its authority so long as it keeps within the bounds of its jurisdiction. *Ib.*
11. **IDEM—PROTECTION OF JUDGES.**—It is within the power of the government of the United States to protect all the agencies and instrumentalities necessary to accomplish the objects and purpose of that government. It is therefore empowered to protect the lives of the judges of its courts from assault and assassination, on account of their judicial decisions, by desperate, disappointed litigants, not only while actually holding court, but while such judges are traveling through their circuits for the purpose of holding courts at the different places therein appointed by law for that purpose. *Ib.*
12. **POWERS OF UNITED STATES MARSHAL.**—An assault upon, or an assassination of, a judge of the United States court, while engaged in any matter pertaining to his official duties, on account or by reason of his judicial decisions or action in performing his official duties, is a breach of the national peace affecting the authority and interests of the United States, and within the jurisdiction and power of the United States marshal or his deputies to prevent, as a peace officer of the national government. *Ib.*
13. **IDEM.**—By section 788 of the Revised Statutes, and the several provisions of the statutes of California prescribing the duties of sheriffs, by that section made applicable to marshals, the United States marshal is made a peace officer, and as such, he is authorized to preserve the peace, so far as a breach of the peace affects the authority of the United States, and obstructs the operations of the government and its various departments. The courts of the United States must be enabled fully to perform all the functions imposed upon them by the constitution and laws, without hindrance or obstruction, and they have the inherent power to protect themselves by and through their executive officers, under the direction and supervision of the attorney-general and the President, against obstruction and hindrance in the performance of their judicial duties. *Ib.*
14. **IDEM—HOMICIDE BY MARSHAL—HABEAS CORPUS—JURISDICTION.**—Where a deputy United States marshal, acting under instructions from his superior officers—the United States marshal and the attorney-general—in protecting the life and person of a justice of the supreme court of the United States from a murderous assault, made on account of his judicial decisions, at the hands of a dissatisfied litigant, finds it necessary to take the life of the assailant, and is arrested by the state authorities, and held upon a charge of murder for such act, the United States circuit court may, upon habeas corpus, discharge such United States officer from the custody of the state authorities, upon it being shown that the homicide was necessary, or that it was reasonably apparent to the mind of the deputy-marshal, at the time and under the circumstances surrounding him, that the killing was necessary in order to protect and defend the justice from great bodily injury, or to save his life. *Ib.*

15. **IDEM.** — The homicide in such case, if an offense at all, is an offense under the laws of the state, and only the state can deal with it in that aspect. It is not claimed to be a crime punishable under the laws of the United States. But the homicide, when necessarily committed by a deputy-marshal in the performance of his duty, in protecting the life and person of a justice of the United States supreme court from assault and violence because of his judicial decisions, is an "act done in pursuance of a law of the United States," and is not and cannot, therefore, be an offense against the laws of the state, no matter what the statute of the state may be; the laws of the United States being the supreme law of the land. *Ib.*
16. **IDEM.** — It is the exclusive province of the United States courts to ultimately and conclusively determine any question of right, civil or criminal, arising under the laws of the United States. It is therefore the prerogative of the national courts to construe the national statutes, and determine, upon habeas corpus, whether a homicide for which the petitioner is charged with murder by the state authorities was the result of an "act done in pursuance of a law of the United States;" and, when that question has been determined in the affirmative, the prisoner will be discharged, and the state has nothing more to do with the matter. *Ib.*
17. **IMPLIED POWERS OF THE NATIONAL GOVERNMENT.** — All the law of the United States is not specifically expressed in statutory enactments. Many powers are necessarily inherent in the various departments of the government, without which the government could not perform functions necessary to its existence. The exercise of such powers is, nevertheless, in pursuance of the laws of the United States. *Ib.*
18. **IDEM — STATUTES — CONSTRUCTION.** — When statutes confer powers, impose duties, and provide for the accomplishment of various objects, they are necessarily couched in general terms, but they carry with them, by implication, all the powers, duties, and exemptions necessary to accomplish the objects thereby sought to be attained. *Ib.*
19. **ACTS OF HEADS OF GOVERNMENTAL DEPARTMENTS.** — The acts of the heads of departments of the United States government, in the line of their duties, are, in contemplation of law, the acts of the President himself. *Ib.*
20. **HOMICIDE — KILLING IN DEFENSE OF ANOTHER.** — A party resisting a murderous assault, where several lives are in danger, being in the best position to judge as to the dangers and requirements of the occasion, is the one to determine when the proper moment has arrived, in self-defense, to slay his assailant, in order to be justified by the law; and if he acts in good faith, with reasonable judgment and discretion, the law will justify him, even though he errs. Where several lives are in danger from the assault of a powerful, infuriated, desperate man, common prudence would dictate that the party assailed should fire a second or two too soon, rather than a fraction of a second too late. *Ib.*
21. **WIFE AND CHILDREN OF CHINESE MERCHANT.** — The wife and children of a Chinese merchant, who is entitled under article 2 of the treaty of 1880, and section 6 of the act of 1881, to come within and dwell in the United States, are entitled to come into the country with him or after him, as such wife and children, without the certificate presented in said section 6. *In re Chung Toy Ho*, 531.

HOMESTEAD.

1. **ENTRY AND CERTIFICATE UNDER THE HOMESTEAD LAW.** — An entry and certificate issued to a settler under the homestead act, for land subject to entry thereunder, cannot be set aside or canceled by the land department on its own motion, for fraud or mistake committed or occurring in obtaining or issuing it. In such case the government must seek redress in the courts, where the matter may be heard and determined according to the law applicable to the rights of individuals under like circumstances. (*Smith v. Ewing*, 11 Sawy. 56, affirmed.) *Wilson v. Fine*, 224.

INDEBTEDNESS OF TOWNS.

1. **INDEBTEDNESS OF TOWNS.**—An ordinance of a municipal corporation which provides for the payment of money by the town, without providing the means wherewith to make such payment, creates an indebtedness against such corporation, within the meaning of section 5 of article 11 of the Constitution of the state. *Murphy v. East Portland*, 555.
2. **INJUNCTION OF LEGISLATIVE ACT.**—A court of equity will not enjoin a municipal corporation in the exercise of its legislative function, unless the proposed act is beyond the scope of its power, and its passage would work irreparable injury. *Ib.*
3. **MATTER IN DISPUTE—VALUE OF.**—In a suit by a tax-payer to enjoin the passage of an ordinance creating an indebtedness against the town on account of its alleged illegality, the matter in dispute is the sum of the taxes which the plaintiff would have to pay in discharge of said indebtedness; and it must appear with reasonable certainty from the facts stated in the bill that such taxes exceed in value the sum of two thousand dollars. *Ib.*

'INDIANS AND INDIAN COUNTRY.

1. **INDIANS—TRADING IN INDIAN COUNTRY—KLAMATH RESERVATION.**—The act of April 8, 1864, provides that there shall be set apart by the President, at his discretion, not exceeding four tracts of land, in California, for Indian reservations; that "said tracts to be set apart as aforesaid" may, or may not, in his discretion, include existing reservations; and that the reservations which shall not be retained shall be surveyed and sold as therein provided. Four tracts were afterwards set apart, none of them including the previously existing Klamath reservation. *Held*, that such Klamath reservation was not "Indian country," within the meaning of the Revised Statutes, section 2133, prescribing the penalty for unauthorized trading in the Indian country. (Affirming, 35 Fed. Rep. 403.) *United States v. Forty-eight Pounds Rising Star Tea*, 19.
2. **INDIANS—CRIMINAL OFFENSES—HALF-BREED.**—The son of a negro father by an Indian mother is not an Indian, within the meaning of the act of Congress of March 3, 1885 (23 Stats. at Large, 385), providing for the punishment of Indians committing certain offenses, as the child follows the condition of the father. *United States v. Ward*, 472.

INDICTMENTS.

See CRIMINAL LAW.

INJUNCTION.

1. **INDEBTEDNESS OF TOWNS.**—An ordinance of a municipal corporation which provides for the payment of money by the town, without providing the means wherewith to make such payment, creates an indebtedness against such corporation, within the meaning of section 5 of article 11 of the Constitution of the state. *Murphy v. East Portland*, 555.
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4. **CLOUD UPON PLAINTIFF'S TITLE.**—A patent issued in the name of the United States to a pre-emptor, entering upon these lands subsequent to the order of withdrawal, is erroneously issued, without authority of law, and is void. The existence of such a patent is a cloud upon the complainant's title. It embarrasses the assertion of complainant's rights, and prevents it getting a patent to the same land to which it is entitled. These circumstances constitute ground for equitable relief. A patent so issued to a pre-emptor is void, and the using of it should be perpetually enjoined. *S. P. R. R. Co. v. Wiggs*, 568.
5. **DECISION OF SECRETARY OF INTERIOR NOT CONCLUSIVE UPON QUESTIONS OF LAW.**—Where the secretary of the interior, acting upon a known and recognized state of facts, draws therefrom an erroneous conclusion of law, and, in pursuance of such erroneous conclusions, issues a patent to a party not entitled thereto, his action is not conclusive, but is subject to review and reversal by the courts. *Ib.*

INJUNCTION AND ACCOUNTING.

See COPYRIGHTS.

JUDGES UNITED STATES COURTS, PROTECTION OF.

See HABEAS CORPUS, *In re Neagle*.

JURISDICTION.

1. **EQUITY—JURISDICTION—ADEQUATE REMEDY AT LAW.**—Bills to have an adjustment of a loss under several insurance policies declared void for fraud, and to restrain actions thereon filed by the several insurance companies, would not avoid multiplicity of suits; and they are not bills for discovery, defendant being a corporation, and its officers not being parties, and answers on oath being waived, and the testimony being obtainable by examining the persons having knowledge as witnesses. The companies have a plain, adequate, and complete remedy at law, and suits in equity, therefore, under Revised Statutes, section 723, are not maintainable. *M. F. I. Co. v. S. C. H. & A. Works*, 21.
2. **UNITED STATES COURTS—JURISDICTION—HABEAS CORPUS.**—Under the provisions of sections 751 to 753 of the Revised Statutes, the courts of the United States and their judges have jurisdiction, upon a writ of habeas corpus, to inquire into the cause of the imprisonment of the petitioner; and if, upon such inquiry, he is found to be "in custody for an act done or omitted, in pursuance of a law of the United States," he is entitled to be discharged, no matter from whom, or under what authority, the process under which he is held may have issued; the constitution, and laws of the United States made in pursuance thereof, being the supreme law of the land. *In re Neagle*, 232.
3. **IDEM.**—In the exercise of this jurisdiction there is no conflict of authority between the state and the United States. The laws of the United States being the supreme law of the land, the authority of the state in such cases is subordinate, and that of the United States paramount. — *Ib.*

See EQUITY; ADMIRALTY; HABEAS CORPUS, *In re Neagle*.

LIEN, MECHANIC'S.

1. **LIEN LAW OF 1885—STRUCTURE.**—The general phrase in the act of 1885, "any other structure," following, as it does, a specific enumeration of works declared to be subject to a lien for labor and materials furnished for their construction, such as a "building," "ditch," "flume," and "tunnel," held to include a railway. *G. P. Co. v. O. P. Ry. Co.*, 560.

2. **LIEN ON RAILWAY—MAY BE LIMITED TO A SECTION.**—A person entitled to a lien on a railway for materials furnished for its construction may in his notice of lien confine his claim to that portion or section of the road in the construction of which his material was used. *Ib.*
3. **GIANT POWDER—MATERIAL.**—Giant powder furnished by the manufacturer to a contractor for the construction of a railway, and used by the latter in the progress of such work, is "material," within the purview of the lien law of 1885, for the value of which such manufacturer is entitled to a lien on the railway, or such portion thereof as the powder was used in the construction of. *Ib.*

See TRUST.

LIMITATIONS, STATUTE OF.

1. **RELIEF AGAINST MISTAKE—LIMITATION OF ACTIONS.**—A bill filed by the United States as real and not merely nominal complainant, to repeal patents improperly issued, is not barred by the statute of limitations or by laches. *United States v. S. P. R. Co.*, 60.
2. **EQUITY—JURISDICTION—FRAUD—CANCELLATION OF INSTRUMENTS.**—There may often be a remedy, at law, for fraud, but where it is desirable to remove a cloud from the title to real estate by decreeing a cancellation of a fraudulent conveyance, that remedy, being more complete, courts of equity will take jurisdiction, and grant appropriate relief. *Teall v. Slaven*, 365.
3. **IDEM—LIMITATION OF ACTIONS—DISCOVERY OF FRAUD.**—In providing for limitations of actions founded on fraud, the legislature has adopted the principle established by courts of equity, that the cause of action shall not be deemed to have accrued until the "discovery of the facts constituting the fraud;" and to ascertain what conditions constitute a discovery, within the meaning of such statutes, the principles established in equity jurisprudence, whence the idea was derived, must be applied. *Ib.*
4. **IDEM—NOTICE.**—The established principles as to the discovery of fraud are, that the party must be diligent in making inquiry; that means of knowledge are equivalent to knowledge; that a clue to the facts, which if diligently followed would lead to a discovery, is, in law, equivalent to a discovery. *Ib.*
5. **IDEM—RECORD OF FRAUDULENT DEED.**—Where a deed alleged to be fraudulent, bearing evidence of fraud upon its face, has been duly recorded upwards of thirty years, it affords just as strong evidence of fraud to the parties defrauded, as it does to subsequent purchasers. As to the parties defrauded, the question, of what the record imparts knowledge, is not, as in the case of subsequent purchasers, a question of statutory constructive notice, but of diligence. *Ib.*
6. **IDEM—PLEADING.**—Where a bill to annul a conveyance on the ground of fraud is filed, more than thirty years after the performance of the acts of fraud complained of, and, in order to bring the case within the statutory exception, it is alleged that "the acts constituting the fraud" have only been discovered within three years before the filing of the bill, it is, also, necessary to set forth in the bill, *specifically*, what the impediments were to an earlier prosecution of the claim; how the complainant came to be so long ignorant of his alleged rights; the means used by the respondent to keep him in ignorance, and how he first came to a knowledge of his rights. *Ib.*
7. **IDEM—LACHES—NON-RESIDENCE.**—The non-residence and continued absence of the complainant from the state does not excuse a want of diligence in ascertaining his rights. *Ib.*
8. **IDEM—FACTS IN SUIT.**—It is alleged in the bill, that T., a citizen and resident of New York, owning land in California, executed a power of attorney to D., to take exclusive possession and control of the same, and to sell and convey it at his discretion, which power of attorney was duly recorded and remained unrevoked till the death of T., on August 12, 1857; that after the death of T., on

September 17, 1857, D., by virtue of said power of attorney, executed in the name of D. a conveyance expressing a consideration of five thousand dollars, to R., of a large amount of said real property situated in the city of San Jose, the said conveyance bearing date August 1, 1857, eleven days prior to the death of T.; that on the same day, for a like consideration expressed, R. conveyed the same property to D., by deed bearing the same date; that said conveyances were made without consideration, and for the fraudulent purpose of enabling D. to appropriate said property of T. to his own purposes; that said conveyances were acknowledged on September 17, and recorded on October 3, 1857; that the numerous respondents are grantees direct, and mesne, from D., and that they purchased with a knowledge of the title of T.; that D. in his lifetime, and respondents, and their grantors, since D.'s death in 1876, concealed these fraudulent acts from complainants, a portion of the heirs of T., who have always lived in the state of New York and never have been in California, and that they did not discover these fraudulent acts until some time in the year 1887, a short time before the commencement of this suit. *Held*, (1) that the suit is barred by the statute of limitations of California; (2) that the cause of suit is stale, and will not be enforced within the established principles of equity jurisprudence; (3) that during the thirty-two years that have elapsed since the death of T., and the fourteen years since the death of D., presumably the only parties who knew their exact relations to each other, and to this land, no sufficient diligence has been exercised by complainants to preserve their right of suit; and (4) that the impediments to a prosecution of the rights of complainants, how they were so long ignorant of them, the means of concealment adopted by respondents, and how complainants first came to a knowledge of their rights, are not sufficiently set out in the bill. *Ib.*

9. **LIMITATION OF ACTIONS—RUNNING OF THE STATUTE.**—The statute of limitations does not run against the United States; and the cause of action here was not stale, the company having been, from the first, active in pursuing its right before the department of the interior. *United States v. Curtner*, 535.
10. **UNITED STATES CONTRACTS RELATING TO PUBLIC LANDS—ACTIONS.**—The government is not without interest in this action, being responsible to the company for the land or its full value, by reason of the statutory grant and contract in the congressional acts of 1862 and 1864. *Ib.*

See MORTGAGES; RAILROAD LAND GRANTS.

MARSHALS, UNITED STATES.

See HABEAS CORPUS, *In re Neagle*.

MECHANIC'S LIEN.

See LIEN, MECHANIC'S.

MEXICAN GRANTS.

1. **PATENTS ISSUED ON MEXICAN GRANTS.**—In an action of ejectment for land in California, where both parties assert title to the premises, under patents of the United States, issued upon concessions of former governments, confirmed by the tribunals of the United States, the controversy can only be determined by reference to those concessions, or by the proceedings had for their recognition and confirmation under our government. *Harrison v. Ubrichs*, 155.
2. **EFFECT OF PATENT ON GRANTS UNDER LAWS OF 1824 AND REGULATIONS OF 1828, WITH JURIDICAL POSSESSION, ETC.**—EFFECT OF SUBSEQUENT PATENT ON SUCH A PATENT.—A grant made by the superior political chief of the territory of Upper California, in conformity with the colonization law of Mexico of 1824 and the executive regulations of 1828, followed by the ceremony of juridical possession, by which, after citation to the neighboring proprietors to be present at the

proceeding, the land was measured, its boundaries marked, and the grantee put in possession, vested the title in fee in the grantee, subject only to the possibility of its being divested, by the refusal of the departmental assembly to give its approval to the grant. A patent of the United States, issued upon a title of that character, confirmed by the tribunals of the United States, and located by the executive officers of the United States, is unaffected by a subsequent patent, based on a confirmation of a title, depending upon the validity of an order made by a governor of California commissioned by the Spanish crown, which order did not in itself convey any interest in the land, and was not followed by any proceeding which purported to have that effect. *Ib.*

3. **EFFECT OF POSSESSION UNDER LAW OF MEXICO, UNDER INSTRUMENT NOT CONVEYING TITLE.** — Under the law of Spain and Mexico, mere possession, however long continued, of any portion of public domain, under an instrument which did not purport to transfer the property, did not create a title which would enable the possessor to hold the land against the Spanish crown, or against the Mexican government. *Ib.*
4. **DUTY OF GOVERNOR UNDER REGULATIONS OF 1828 RESPECTING GRANTS ISSUED BY HIM.** — Under the regulations of Mexico of 1828, it was the duty of the governor, and not of the grantee, to submit to the departmental assembly grants issued by him, for their approbation. His neglect in this respect suspended the definite validity of the grant; that is, prolonged the liability of the estate to be defeated by the action of the assembly and of the supreme government thereon, but did not operate to divest the estate, already vested in the grantee. *Ib.*
5. **PATENT OF UNITED STATES TO LAND ON CONFIRMED GRANT MADE UNDER LAW OF 1824 PASSES TITLE.** — By a patent issued by the United States, upon a grant, made in conformity with the colonization law of 1824, followed by the ceremony of juridical possession, confirmed and located by the United States, whatever title is in the United States passes to the patentee. After a patent so issued, no title remains in the United States, which they could convey by any subsequent patent. However conclusive against the United States, and parties claiming under them by title subsequent, a patent may be, it in no respect impairs the right of a previous patentee to contest the title upon which the subsequent patent has issued for the premises. *Ib.*
6. **POWER OF POLITICAL CHIEF OF UPPER CALIFORNIA TO ALIENATE LAND, DOUBTED.** — Whether the political chief of the territory of Upper California, under the Spanish crown, possessed any power to alienate the fee of any portion of the public domain, *doubted.* *Ib.*
7. **PUBLIC LANDS—MEXICAN GRANT.** — The Mexican grant called Las Pocitas was a float—a grant of two leagues within exterior boundaries embracing ten or more leagues, which two leagues so granted were confirmed and patented to the claimants, and the odd-numbered sections outside of the two leagues granted and confirmed, but inside of the exterior boundaries, passed to the railroad company. *United States v. Curtner*, 535.
8. **IDEM.** — The prior decision, in *Newhall v. Sanger*, 92 U. S. 761, by the United States supreme court, materially limited in its operation by the recent decision in *United States v. McLaughlin*. *Ib.*
9. **MEXICAN GRANTS—WHEN CEASE TO BE SUB JUDICE.** — When a Mexican grant, by specific boundaries, carrying all the lands within the designated boundaries, has been confirmed by a decree which has become final, the said decree specifically pointing out and designating the corners by natural objects on the ground, and the connecting lines, all lands outside those specific monuments and lines, from the date when the decree becomes final, cease to be *sub judice*, if they ever were in that condition, within the meaning of those terms as used by the supreme court in the cases of *Newhall v. Sanger*, *Doolan v. Carr*, and *United States v. McLaughlin*. *United States v. Colten M. & L. Co.*, 620.

See PUBLIC LANDS; RAILROAD LAND GRANTS.

MILITARY ROAD GRANTS.

See PUBLIC LANDS.

MINERAL LANDS.

See PUBLIC LANDS; RAILROAD LAND GRANTS.

MORTGAGE.

1. **EQUITABLE MORTGAGE.**—A written agreement for security on certain property for the payment of a debt is in equity a mortgage, and will be enforced as such against all parties to the agreement, and those who have notice of it. *Gist v. Packwood*, 131.
2. **IDEM.**—R. gave his notes to P. and C. in payment on the purchase of a mining ditch and grounds, and agreed in writing with them that if such notes were not paid when due, he would reconvey the property to them as security for their payment; the notes not being paid, R. gave C. and P. a lease of the property, with a right to apply the net profits and proceeds from year to year on these notes. *Held*, (1) that the agreement to give security being in equity a mortgage, the lease, with a pledge of the rents and profits, was accepted as a fulfillment of the agreement, and the agreement and lease taken together created a continuous lien on the property in favor of the payee of the notes or his assigns, from the date of the agreement; (2) that the assignment of the rents and profits of the property of the lessees for the payment of the notes created a lien on the body of the property, which, in case the rents and profits are insufficient to pay the same, may be enforced in equity; (3) during the possession under this lease the lessees were not authorized to charge the property with the expense of operating or improving it, and if the expenditures in any one year exceeded the receipts, such excess was their personal debt. *Ib.*
3. **STATUTE OF LIMITATIONS.**—In the consideration of purely equitable rights and titles courts of equity are not governed by the statute of limitations. *Ib.*
4. **EQUITABLE INTEREST IN LAND.**—The sale of an equitable interest in land is not the mere assignment of a right of action thereabout, and in a suit in a national court by the vendee, to establish his right therein, it is not material what the citizenship of his vendor is. *Ib.*
5. **JUDGMENT OF A STATE COURT.**—The plaintiff in a decree in a state court, given in a suit to enforce the lien of a mortgage on real property, is a proper party to a suit in a national court to enforce an alleged prior lien on the same property, and in such suit the validity and effect of such mortgage and decree may be inquired into and determined as an original question. *Ib.*
6. **MORTGAGES—DEED ABSOLUTE IN FORM—EVIDENCE.**—In a suit to declare a deed absolute on its face a mortgage, and to redeem therefrom, it appeared that O., who was complainant's mother-in-law, was indebted to defendant and to complainant; that she executed to defendant an absolute deed to all her land, which was not at the time worth more than the debt, and received from him all evidences of debt. This deed complainant claimed to have been intended as a mortgage, under an agreement by which he was to have the right to redeem the land thereby conveyed on his subsequent payment of all the indebtedness. O. testified that the deed was intended as an absolute conveyance, and letters from her to defendant and to complainant tended to show that this was the understanding. There were letters from complainant to defendant and to O. running through several years, during which he made no claim that the deed was a mortgage, which went to show that he regarded it as absolute. His testimony was contradictory and improbable. Defendant, and other members of his firm, testified that the deed was absolute. *Held*, that the deed was an absolute conveyance. *Kuhn v. Weill*, 502.

MUNICIPAL CORPORATION.

1. **SUIT IN EQUITY FOR THE VIOLATION OF A RIGHT SECURED BY A PATENT.** — Under section 4921 of the Revised Statutes, where a decree is given in a suit in equity restraining the infringement of a right secured by patent, the court may also decree a recovery of the profits arising from such infringement and the damages the plaintiff has sustained thereby. *A. T. & M. Co. v. Hepp*, 96.
2. **MUNICIPAL CORPORATION—WHEN LIABLE FOR THE ACTS OF ITS OFFICERS.** — Where the council of Portland authorizes a contractor to lay a sewer in one of its streets, in pursuance of a power contained in its act of incorporation, and in so doing the contractor infringes upon the patent of another for making sewer pipe, the act being a corporate one for the benefit of the corporation, it is liable for such infringement, the same as a private corporation or person. *Ib.*

NEGLIGENCE.

1. **CONTRIBUTORY NEGLIGENCE.** — Contributory negligence is a defense, which necessarily implies negligence on the part of the defendant, and is therefore a plea of confession and avoidance. *Watkins v. S. P. Co.*, 30.
2. **IDEM.** — A statement in an answer purporting to be a defense of contributory negligence, to an action for damages for an injury to the person, which only denies that the injury was caused by the negligence of the defendant, and alleges that it was "wholly" caused by the negligence of the plaintiff, is not such a defense, but only a denial of the plaintiff's negative allegation, that the injury was not caused by his negligence, and needs no reply. *Ib.*
3. **IDEM—DENIAL OF, BY PLAINTIFF.** — Where the plaintiff alleges in his complaint that the injury, which is the subject of the action, was not caused by any fault or negligence on his part, and the defendant, instead of moving to strike out the allegation, specifically denies the same, an issue is formed on the question of contributory negligence, and no further pleading is necessary thereabout. *Ib.*
4. **MOTION FOR JUDGMENT ON THE PLEADINGS.** — A motion for a judgment on the pleadings will not be allowed under section 78 (Comp. 1887), unless the defense is admitted by the failure to reply thereto, and the matter contained therein is not otherwise contested or put in issue in the pleadings, and is sufficient to justify the judgment. *Ib.*

See ADMIRALTY.

PARTNERSHIP.

1. **ANSWER—LIMITED PARTNERSHIP.** — The Revised Statutes of New York, chapter 4, title 1, section 7, upon the formation of limited partnerships, requires that an affidavit of one or more general partners shall be filed with the original certificate, stating that the sum therein specified to have been contributed by the special partner was actually and in good faith paid in cash. *Held*, that on a suit to charge a special as a general partner, an answer which, instead of an averment that such sum was paid, alleges that such affidavit was duly filed, is not demurrable, since the affidavit itself, if given in evidence, would be *prima facie* proof of such payment. *Rawitzer v. Wyatt*, 438.

PATENTS TO PUBLIC LANDS.

See PUBLIC LANDS.

PATENTS AND PATENT RIGHTS.

1. **SUIT IN EQUITY FOR THE VIOLATION OF A RIGHT SECURED BY A PATENT.** — Under section 4921 of the Revised Statutes, where a decree is given in a suit in equity restraining the infringement of a right secured by patent, the court may also decree a recovery of the profits arising from such infringement and the damages the plaintiff has sustained thereby. *A. T. & M. Co. v. Hepp*, 96.

2. **MUNICIPAL CORPORATION—WHEN LIABLE FOR THE ACTS OF ITS OFFICERS.**—Where the council of Portland authorizes a contractor to lay a sewer in one of its streets, in pursuance of a power contained in its act of incorporation, and in so doing the contractor infringes upon the patent of another for making sewer pipe, the act being a corporate one for the benefit of the corporation, it is liable for such infringement, the same as a private corporation or person. *Ib.*
3. **PATENTS FOR INVENTIONS—INVENTION.**—Where a welt of a double piece of leather, inserted in a seam in such manner that the edges come on the inside so as to require no trimming on the outside, the welt presenting a rounded appearance, has been for years used in gentlemen's and ladies' saddles, in leathern cushions, horse collars, leather bags, satchels, hand-bags, ladies' reticules of various kinds, and in the uppers of boots and shoes, it requires no invention to transfer the same kind of welt to gloves. This is but a double use for analogous and similar purposes, and is not patentable. *Busby v. Ladd*, 118.
4. **PATENTS FOR INVENTIONS—INFRINGEMENT—GANG-EDGES.**—*Held*, on the evidence, that claim 1 of patent No. 227,986 and claim 1 of patent No. 290,358 are infringed by defendants, and that claim 8 of patent No. 258,946 is not infringed. *Tatum v. Gregory*, 376.
5. **IDEM—STATE OF THE ART—EVIDENCE.**—Evidence of the existence of a single isolated machine many years prior to the date of the patent, which is not shown to have gone into use, is not competent or sufficient to show the state of the art. *Ib.*
6. **IDEM.**—Proof of the state of the art in patent cases must be clear and satisfactory and free from reasonable doubt, especially when it relates to a time many years anterior to the date of the patent, and the witness relies solely on his memory. *Ib.*
7. **IDEM—MECHANICAL EQUIVALENTS.**—In construing patents the doctrine of mechanical equivalents is applicable to claims for combinations of old elements and improvements on primary inventions, as well as to claims for primary inventions. *Ib.*
8. **IDEM—COMBINATIONS.**—A claim for a combination of elements is infringed only by use of all its elements; and where the evidence of infringement is clear only as to the use of one of the elements of the combination by defendant, and is not clear or satisfactory as to the use of the other elements, it will be *held* that infringement is not proven. *Ib.*
9. **PATENTS FOR INVENTIONS—EXTENT OF CLAIM—PROCESS FOR WORKING ASPHALTUM.**—*Held*, on the evidence adduced, that letters patent No. 319,125, for a process of working and using asphaltum, granted to Judson Rice, Andrew Steiger, and Isaac L. Thurber, on June 2, 1885, are valid; but must be limited to a process in which the bituminous material is placed in a vessel with water and the two are boiled together, during which process steam is generated from the water, and permeating the bituminous material disintegrates it, the claim of the patent being in effect a claim for the use of water and steam combined. *Walrath v. Pacific Pav. Co.*, 410.
10. **IDEM—PRIOR STATE OF ART—PROCESS FOR WORKING BITUMINOUS SAND-ROCK.**—*Held*, on the evidence adduced, that letters patent No. 342,852, for a paving, roofing, and building compound, granted to Austin Walrath on June 1, 1886, are valid; but in view of the state of the art, must be limited to a process in which the bituminous material is placed alone in one vessel, and steam is generated in another and distinct vessel, and conveyed therefrom by a pipe into the mass of bituminous material, so that said steam will permeate and thereby disintegrate the bituminous material. *Ib.*
11. **PATENTS FOR INVENTIONS—PATENTABILITY—AGGREGATION—IMPROVEMENT IN OIL CARS.**—Letters patent No. 216,506, granted to M. Campbell Brown on June 17, 1879, for an improvement in oil cars, consisting in the division of the car space into two or more compartments, each end compartment containing an oil

tank, the partitions between all the compartments being removable, and readily adjustable, are not void as being a mere aggregation of devices, since they obviate the necessity of hauling back empty tank cars, thereby cheapening transportation. *Standard Oil Co. v. S. P. Co.*, 430.

12. **IDEM—ACTION FOR INFRINGEMENT—PRACTICE.**—Where the question of the validity of a patent is doubtful, a demurrer to a bill for its infringement will be overruled, and the question reserved for further consideration on final hearing. *Ib.*
13. **PATENT—INFRINGEMENT—PRELIMINARY INJUNCTION.**—In an action for infringement, brought only a few days before the expiration of the patent, it appeared that the invention was made and patented while the patentees were in the employment of defendant, though they soon afterwards left it; that defendant had, with plaintiff's knowledge and approval, used the invention prior to the issue of the patent, and such use had continued to the commencement of the suit, without any express contract for compensation, though one of the patentees had notified defendant's president that, after he left its employment, defendant must pay for the use of the invention at the same rate that others paid. *Held*, that there was no ground for equitable interference to restrain such use for the few remaining days of the life of the patent by preliminary injunction. *Keyes v. Eureka Con. Manuf. Co.*, 610.
14. **IDEM—SUIT FOR ROYALTIES—NATIONAL JURISDICTION.**—The only ground of equitable jurisdiction being relief by injunction, and patent having expired before defendant was required to answer, so that no injunction could have been granted on final decree, the only remaining cause of action, being for royalties under an implied license for the use of the invention after the notice, is purely legal, and, in the absence of a proper showing as to citizenship, there is no element of national jurisdiction, and the bill must be dismissed. *Ib.*

PATENTS TO PUBLIC LANDS.

See PUBLIC LANDS.

PILOTS.

See ADMIRALTY.

PLEADINGS AND PRACTICE.

1. **CONTRIBUTORY NEGLIGENCE.**—A statement in an answer purporting to be a defense of contributory negligence, to an action for damages for an injury to the person, which only denies that the injury was caused by the negligence of the defendant, and alleges that it was "wholly" caused by the negligence of the plaintiff, is not such a defense, but only a denial of the plaintiff's negative allegation, that the injury was not caused by his negligence, and needs no reply. *Watkins v. S. P. Co.*, 30.
2. **IDEM—DENIAL OF, BY PLAINTIFF.**—When the plaintiff alleges in his complaint that the injury, which is the subject of the action, was not caused by any fault or negligence on his part, and the defendant, instead of moving to strike out the allegation, specifically denies the same, an issue is formed on the question of contributory negligence, and no further pleading is necessary thereabout. *Ib.*
3. **MOTION FOR JUDGMENT ON THE PLEADINGS.**—A motion for a judgment on the pleadings will not be allowed under section 78 (Comp. 1887), unless the defense is admitted by the failure to reply thereto, and the matter contained therein is not otherwise contested or put in issue in the pleadings, and is sufficient to justify the judgment. *Ib.*

4. **PLEADING — PLEAS IN ABATEMENT — WHEN TO BE FILED.** — The act of Congress of March 3, 1875, section 5, provides "that if, in any suit commenced in a circuit court, or removed from a state court to a circuit court of the United States, it shall appear to the satisfaction of said circuit court, at any time after such suit has been brought or removed thereto, that such suit does not . . . involve a dispute . . . properly within the jurisdiction of said circuit court, or that the parties to said suit have been improperly or collusively made or joined . . . for the purpose of creating a case cognizable or removable under this act, the said circuit court shall proceed no further therein." Rule 9 of the circuit court provides that "when any matter in abatement, other than such as affects the jurisdiction of the court, shall be pleaded in the same answer with matter in bar or to the merits, or simultaneously with an answer of matter in bar or to the merits, the matter so pleaded in abatement shall be deemed to be waived." *Held*, that neither the act nor the rule authorizes the plea to the jurisdiction to be entered after answer to the merits, and after the commencement of taking testimony. *Heritt v. Story*, 77.
5. **ANSWER — LIMITED PARTNERSHIP.** — The Revised statutes of New York, chapter 4, title 1, section 7, upon the formation of limited partnerships, requires that an affidavit of one or more general partners shall be filed with the original certificate, stating that the sum therein specified to have been contributed by the special partner was actually and in good faith paid in cash. *Held*, that on a suit to charge a special as a general partner, an answer which, instead of an averment that such sum was paid, alleges that such affidavit was duly filed, is not demurrable, since the affidavit itself, if given in evidence, would be *prima facie* proof of such payment. *Rauitzer v. Wyatt*, 438.
6. **EJECTMENT — PLEADING — COSTS AND DAMAGES.** — In ejectment for land of which the several defendants had taken possession, each claiming a certain portion, where some of the defendants enter a disclaimer, and others, with plaintiff's consent, agree to a judgment against them without costs or damages, the remaining defendants, who only plead the general issue, are, on a general verdict against them, liable for all the costs and damages. *Bell v. Foxen*, 499.
7. **IDEM — POSSESSION.** — Ejectment lies against persons who have entered on land, and claim possession adverse to the true owner, though they are not personally in possession at the commencement of the action. *Id.*

PRACTICE.

See PLEADINGS AND PRACTICE.

PRESIDENTS AND HEADS OF DEPARTMENTS, POWERS OF.

See HABEAS CORPUS, *In re Neagle*.

PRINCIPAL AND ATTORNEY.

See TRUST.

PRISON, PENITENTIARY, MEANING OF.

See HABEAS CORPUS.

PUBLIC LANDS.

1. **PUBLIC LANDS — DONATIONS — RAILROAD COMPANIES.** — The act of Congress of July 27, 1866, granted to the A. & P. Co. every alternate section of public land by odd numbers to the amount of ten sections on each side of the road, wherever it might pass through a state. If any of these sections should be already granted, reversed, etc., before the map of the proposed route should be filed, other odd

sections might be selected in lieu thereof within ten miles on either side of the limits so granted. Whenever and as often as a portion of the road twenty-five miles long should be completed, patents were to issue for the lands so granted, opposite to and coterminous with the portion or portions completed. The odd sections so granted were withdrawn from entry, etc. By section 18 the S. P. Co. was granted the same amount of lands, under similar restrictions, and it was provided that neither the present nor prospective rights of the A. & P. Co. should be thereby impaired. *Held*, that only the odd sections in the strip absolutely granted, and not those in the indemnity strip, were withdrawn from the public domain, and that the A. & P. Co., not having complied with the conditions of the grant, had neither a present nor prospective right to any lands in the last-mentioned strip, which were therefore still subject to grant. *United States v. S. P. R. Co.*, 60.

2. **IDEM.** — The act of Congress of March 3, 1871, granted certain lands to the S. P. Co., to aid it in the construction of a branch line, and provided that if its route, when designated, should be found to be on the line of another road to which land had also been granted, the amount theretofore granted should be deducted from the quantity thereby granted to the S. P. Co., so far as their routes should be on the same general line. The map of the route of the A. & P. Co. was afterwards filed, and the routes of both roads were for some distance on the same general line. The S. P. Co.'s route included in its ten-mile limit part of the indemnity strip of the A. & P. Co., at points where the A. & P. Co. would have had the right to make selections of lands in lieu of others already taken up. *Held*, that the S. P. Co. acquired no rights as to lands in said indemnity strip so far as the two routes were on the same general line. — *Ib.*
3. **IDEM — MEXICAN GRANTS.** — Lands claimed to be included in a Mexican grant of a specific boundary, which grant was *sub judice* at the time of the grant of March 3, 1871, were not public land at that date, and did not pass by the grant, though they were afterwards held not to be embraced by the Mexican grant. *Ib.*
4. **IDEM — RELIEF AGAINST MISTAKE — LIMITATION OF ACTIONS.** — A bill filed by the United States as real and not merely nominal complainant, to repeal patents improperly issued, is not barred by the statute of limitations or by laches. *Ib.*
5. **PUBLIC LANDS — GRANTS — DALLES MILITARY ROAD.** — The act of Congress of February 25, 1867 (14 Stats. 409), granted to the state of Oregon lands to aid in the construction of a military wagon road from Dalles City to Fort Boise. Section 3 of the act provides that "said road shall be constructed with such width, gradation, and bridges as to permit of its regular use as a wagon road, and in such special manner as the state of Oregon may prescribe." By an act passed October 20, 1868, the state of Oregon transferred the grant to the Dalles Military Road Company, but prescribed no "special manner" for constructing the road. *Held*, that these two acts formed the entire statutory contract with the road company, and that the statute of Oregon of October, 14, 1862, relative to the construction of roads by private corporations, which had no reference to this specific road or grant, did not affect the question between the United States and the road company as to whether the latter had constructed the road in the manner and within the time as prescribed by the act of Congress. *United States v. D. M. R. Co.*, 325.
6. **IDEM.** — There being nothing in either act requiring the road company, or any one claiming under it, to maintain the road after it had been once completed and accepted by the government in accordance with the provisions of the acts, without any such fraud as to vitiate the acceptance, its right to the lands against the United States vested irrevocably upon such acceptance. *Ib.*
7. **TIMBER AND MINERAL LANDS — RAILROADS PROHIBITED FROM USING SAME.** — The defendant, a railroad corporation, purchased, for use upon its locomotives and cars, wood severed from the public mineral lands. *Held*, that such purchase and use was unlawful, and that the United States could recover from the

defendant the value of the wood so severed, and purchased by it. *United States v. Eureka & P. R. R. Co.*, 334.

8. **PUBLIC LANDS—CUTTING TIMBER—PAYMENT FOR LAND.**—A party prosecuted for cutting timber on the public lands under section 2461, Revised Statutes, is only relieved from the criminal prosecution and liabilities provided for in said section 2461 by payment of two dollars and a half per acre for the land on which it is cut; he is not relieved from his civil common-law liability to the United States as owner of the land for the value of the timber cut. *United States v. Scott*, 321.
9. **MINERAL LANDS—RIGHT TO USE TIMBER CUT AND REMOVED THEREFROM.**—The defendant, a corporation, engaged in mining, reducing ores, and refining bullion, purchased wood and charcoal for use at its reduction works. The cord-wood, and the wood from which the charcoal was manufactured, was cut upon unsurveyed public lands, mineral in character, of little or no value, except for the mineral therein, and within organized mining districts, or not far remote from known mines. *Held*, that this was mineral land within the meaning of the act of Congress of June 3, 1878, permitting timber to be taken therefrom for "building, agricultural, mining, or other domestic purposes," and that defendant could lawfully purchase such wood and coal, for said use, under the license given by said act. *United States v. Richmond M. Co.*, 340.
10. **PUBLIC LANDS—GRANT TO CENTRAL PACIFIC RAILROAD COMPANY—GRANT IN PRÆSENTI.**—The grant of lands to the Central Pacific Railroad Company to aid in the construction of its road, under the act of Congress of August 2, 1862, and the amendatory act of 1864, is a grant *in præsentī*, which can only be defeated by the failure to perform the conditions subsequent and appropriate proceedings to declare a forfeiture. *Francoeur v. Newhouse*, 351.
11. **IDEM—EJECTMENT BEFORE PATENT ISSUES.**—The title which vests under the congressional grant, and the performance of the prescribed conditions, is a legal title, upon which an action of ejectment may be maintained before the patent issues. *Ib.*
12. **IDEM—OFFICE OF PATENT.**—The patent issued under the congressional grant is only a convenient instrument of evidence that the conditions have been performed and the title vested. *Ib.*
13. **IDEM—FAILURE TO PAY EXPENSE OF SURVEY.**—The failure to pay the expense of surveying, under section 21 of the act of 1864, only prevents the issue of the patent. It does not prevent the title attaching under the congressional grant. *Ib.*
14. **IDEM—EXCEPTION OF MINERAL LANDS.**—The exception of mineral lands from the grant to the Central Pacific Railroad Company only extends to lands known to be mineral, or apparently mineral, at the time when the grant attached; and a discovery of a gold mine in the lands after the title has vested by full performance of the conditions, does not defeat the title. *Ib.*
15. **IDEM—UNAUTHORIZED EXCEPTION IN PATENT.**—An exception inserted in a patent, which is not authorized by the statute to be inserted, is void. *Ib.*
16. **IDEM—PATENT FOR LANDS ALREADY GRANTED—COLLATERAL ATTACK.**—When a patent is issued for land which has been before granted to other parties, and there is no interest left in the government to grant, the interior department acts without jurisdiction, there being nothing in the United States to grant, and the patent so issued is void, and may be collaterally impeached. *Ib.*
17. **IDEM—RIGHTS OF TRESPASSERS.**—When land has been granted to private parties, other parties have no right afterwards to enter upon the land and prospect for gold. No right can be initiated by a trespass upon private lands. *Ib.*
- LAND GRANTS—MILITARY ROADS—COMPLETION—BONA FIDE PURCHASERS—TOPPEL.**—In 1867 there was granted the state of Oregon, by an act of Congress, certain public lands to aid in the construction of a military wagon road. The grant was in the words, "there be and hereby is granted to the state of Oregon," and it was provided that the lands granted should be disposed of by

the legislature for the purposes of the grant. It was further provided that when the governor of the state should certify to the secretary of the interior that ten continuous miles of the aided road are completed, a quantity of the lands granted, not exceeding thirty sections, might be sold, and so on from time to time until the road should be completed. The governor of Oregon having thereafter certified to the completion of said road, the commissioner of the general land office withdrew from sale the lands granted, in favor of the defendant company, to which the grant had been transferred by act of the state legislature, and afterwards, in 1874, Congress by an act provided "that in all the cases when the roads in aid of the construction of which said lands were granted, are shown by the certificate of the governor of the state of Oregon, as in said acts provided, to have been constructed and completed, patents for said lands shall issue in due form to the state of Oregon as fast as the same shall, under said grants, be selected and certified, unless the state of Oregon shall, by public acts, have transferred its interests in said lands to any corporation or corporations, in which case patents shall issue from the general land office to such corporation or corporations upon payment of the necessary expenses thereof." *Held*, (1) The act granting lands in aid of the Dalles military road passed a present title to the state of Oregon, to be defeated only by a breach of conditions subsequent. (2) The fact that the governor's certificate was not made on completion of each section of ten miles of the road, makes no difference. It is sufficient if made at one time, covering the completion of the whole road. (3) The authority to determine whether the road was completed was vested solely in the governor of Oregon, whose decision, in the absence of any such fraud as would vitiate it, is necessarily final and conclusive. (4) The right to a patent once vested is equivalent, as respects the government dealing with the public lands, to a patent issued. (5) Purchasers of these lands from the state's grantee were not required to go over the road and ascertain for themselves whether it had been completed in all particulars in accordance with the requirements of the granting act, but were entitled to rely upon the record, constituted by the said acts of Congress and of the state, the withdrawal of the lands by the commissioner, and the governor's certificate. (6) The provision of the act of Congress authorizing the bringing of this suit by the United States to procure a decree of forfeiture of said lands. "saving and preserving the rights of *bona fide* purchasers of either of said grants, or of any portion of said grants, for a valuable consideration," recognizes the rights of innocent purchasers, if they had been otherwise doubtful. (7) Where fifteen years have elapsed after affirmative and confirmatory action by Congress in directing the issue of patents to lands in all cases where the certificate of the governor had been made, and twenty years have elapsed after the date of such certificates, and before the act authorizing the bringing of this suit, it is not within the established principles of equity jurisprudence to allow such suit to be maintained, and the cause of suit ought to be regarded as stale. (8) The government is now estopped by the action had from time to time by Congress and its agents duly authorized, and the public record made of such acts, from alleging the non-fulfillment of the statutory conditions of the grant. *United States v. Dalles M. R. Co.*, 387.

19. PUBLIC LANDS—RAILROAD GRANT—NORTHERN PACIFIC—LOCATION OF ROUTE.—Act of Congress of July 2, 1864, granted public lands to the N. P. R. Co., and authorized it to construct a continuous line from Lake Superior, westerly, by the most eligible route, to be determined by said company within the United States, and on a line north of the forty-fifth degree of latitude to some point on Puget Sound, with a branch via the valley of the Columbia River to a point at or near Portland, Or. *Held*, that it was optional with the company whether it would build the branch to Portland. The clause giving it authority to do so did not limit its right to choose any route within the prescribed limits between Lake Superior and Puget Sound. *United States v. N. P. R. Co.*, 401.

20. **IDEM — APPROVAL OF LOCATION.** — Act of Congress of May 31, 1870, authorizing said company to locate and construct, under the provisions, and with the privileges and grants provided in its act of incorporation (Act Cong. July 2, 1864), its main line to Puget Sound via the Columbia River, etc., is an approval and confirmation of the location of its line theretofore made by the company from Lake Superior via the Columbia River and Portland to Puget Sound. *Ib.*
21. **IDEM — GRANT IN PRESENTI.** — The donation of land to said company under act of Congress of July 2, 1864, was a grant in *presenti*, and took effect as of that date upon the subsequent location by the company of its road, and approval thereof by Congress. *Ib.*
22. **IDEM — EFFECT OF DONATION — FILING OF MAP.** — Section 6 of said act provides that the President shall cause the lands to be surveyed for forty miles on each side of the entire line of the road after the general route shall be fixed, "and the old sections of land hereby granted shall not be liable to sale, entry, or pre-emption before or after they are surveyed, except by said company." *Held*, that the act withdrew the lands from liability to pre-emption after the route should be fixed; and on the filing by the company of a map of the route with the secretary of the interior the grant became certain, and attached to the old sections of the land within the forty-mile limit. *Ib.*
23. **IDEM — NEGLECT OF SECRETARY OF THE INTERIOR.** — When the route was adopted by the company, and a map designating it was filed with the secretary of the interior, the route became fixed, within the meaning of the act; and no subsequent neglect of the secretary could affect the rights of the company. *Ib.*
24. **PUBLIC LANDS — DONATION TO RAILROAD.** — 14 Statutes, United States, 292, granted to the Southern Pacific Railroad Company certain land, and provided that, in case any of said land should have been previously disposed of, the company should select other land in certain sections in lieu thereof. The secretary of the interior withdrew such sections, but afterwards allowed a homesteader to enter and obtain patent to a part of one of them. After the patent had issued, the company attempted to select this land, but was not allowed to do so. *Held*, that the company had no right to said land under the grant. *S. P. R. Co. v. Tilley*, 420.
25. **LOCATING PATENT — SURVEYS.** — On a question as to the true location of a patent, boundaries fixed by reversing the courses and distances must govern when found to coincide with the natural calls of the patent. *Ellingwood v. Stancliff*, 467.
26. **IDEM.** — When the points fixed by reversing the courses and distances do not coincide with the natural calls of the patent, or the natural calls cannot be identified, then the regular courses and distances must govern. *Ib.*
27. **LAND GRANT — WAGON ROADS, COMPLETION OF — STALE CLAIM — ESTOPPEL — BONA FIDE PURCHASER.** — In 1866 Congress made a grant of lands to the state of Oregon, to aid in the construction of a wagon road from Albany through the Cascade Mountains to the eastern boundary of the state, and provided that the land might be sold as the work progressed, on the certificate of the governor of the state, that the portion of the same coterminous with said land was "complete." The state transferred the grant without further condition or qualification to the Wallamet Valley and Cascade Mountain Wagon Road Co., which undertook the construction of the road; and, within the five years allowed therefor, procured certificates from the governors of the state that the road was completed as required by law. Soon after the company sold the lands to the defendants, Weill and Cahn, who are now the legal owners thereof, except a small portion which has been disposed of. In 1874 Congress authorized the issue of patents for these lands to the state or its assignee, when it was shown by the certificates of the governor that said road was "constructed and completed." Between 1878 and 1883 a question was made before the department of the interior whether the company had completed the road according to law, and testimony was received on, *pro* and *con*, and after argument, the secretary of the interior directed

patents to issue to the company, which was done on October 30, 1882, for 440.856 acres, in addition to a patent for 107,893 acres, issued on June 19, 1876. In consequence of this action by the secretary, the defendants believed that the due construction of the road was admitted by the complainant, and was thereby induced to expend a large sum of money on and about said property. In 1889 Congress passed an act requiring the attorney-general to bring a suit in this court against all persons claiming an interest in this grant, to determine the question of construction of the road, the legal effect of the governor's certificates, the right of the United States to resume the grant, and to obtain judgment declaring the land coterminous with any uncompleted portions of the road forfeited, saving the rights of any *bona fide* purchasers; the suit to be tried and adjudicated like other suits in equity. On August 29, 1889, in pursuance of this authority, this suit was commenced to obtain the relief therein specified. The defendants, Weill and Cahn, filed two pleas to the bill, in one of which they set up the foregoing facts as an estoppel, and in the other the defense of a *bona fide* purchaser for a valuable consideration, and without notice of any failure on the part of the company to comply with the terms and conditions of the grant. *Held*, (1) that this suit must be tried as a suit between private persons, in which the defendants may set up any defense, including estoppel and the statute of limitations, that they could if the complainant was merely a private person; (2) that the claim of the complainant to set aside these patents and declare these lands forfeited is, under these circumstances, a stale one, and therefore ought not to be allowed; (3) that the complainant, by the passage of the act of 1874, either accepted the certificates as conclusive evidence of the due construction of the road, or thereby waived all further performance of the condition on which the grant was made; (4) that the complainant, by the action of its executive department in issuing the patent of 1882, impliedly recognized and accepted the performance of such condition, and, having thereby induced the defendants to change their relation to said property, by expending a large sum of money thereon and thereabout, is now estopped to allege or claim that said condition was not performed; (5) that the certificate of the governor of Oregon was made by the act of 1866 the only evidence of the compliance with the terms of the grant by the completion of the road; (6) that, upon the facts stated in the plea, the defendants are purchasers in good faith and for a valuable consideration, within the saving clause of the act of 1889, and within the general principles of equity jurisprudence; and (7) that, on the case made by the bill and first plea thereto, it appears that the complainant ought not to prevail in this suit, and therefore it is dismissed. *United States v. W. V. & C. M. W. R. Co.*, 479.

28. PUBLIC LANDS—RAILROAD GRANT—EXCEPTION—MINERAL LAND.—Where a grant to a railroad company excepts mineral land, the term "mineral land" means land known to be mineral land when the grant took effect, or which there was then satisfactory reason to believe to be such. *Francoeur v. Newhouse*, 600.
29. ADVERSE POSSESSION—GOVERNMENT TITLE.—Possession held in subordination to the title of the United States may be adverse as to another claimant. *Ib.*

See RAILROAD LAND GRANTS; MEXICAN GRANTS.

RAILROAD LAND GRANTS.

1. PUBLIC LANDS—DONATIONS—RAILROAD COMPANIES.—The act of Congress of July 27, 1866, granted to the A. & P. Co. every alternate section of public land by odd numbers to the amount of ten sections on each side of the road, wherever it might pass through a state. If any of these sections should be already granted, reserved, etc., before the map of the proposed route should be filed, other odd sections might be selected in lieu thereof within ten miles on either side of the limits so granted. Whenever and as often as a portion of the road twenty-five miles long should be completed, patents were to issue for the lands so granted,

- opposite to and coterminous with the portion or portions completed. The odd sections so granted were withdrawn from entry, etc. By section 18 the S. P. Co. was granted the same amount of lands, under similar restrictions, and it was provided that neither the present nor prospective rights of the A. & P. Co. should be thereby impaired. *Held*, that only the odd sections in the strip absolutely granted, and not those in the indemnity strip, were withdrawn from the public domain, and that the A. & P. Co., not having complied with the conditions of the grant, had neither a present nor prospective right to any lands in the last-mentioned strip, which were therefore still subject to grant. *United States v. S. P. R. Co.*, 60.
2. **IDEM.** — The act of Congress of March 3, 1871, granted certain lands to the S. P. Co., to aid it in the construction of a branch line, and provided that if its route, when designated, should be found to be on the line of another road to which land had also been granted, the amount theretofore granted should be deducted from the quantity thereby granted to the S. P. Co., so far as their routes should be on the same general line. The map of the route of the A. & P. Co. was afterwards filed, and the routes of both roads were for some distance on the same general line. The S. P. Co.'s route included in its ten-mile limit part of the indemnity strip of the A. & P. Co., at points where the A. & P. Co. would have had the right to make selections of lands in lieu of others already taken up. *Held*, that the S. P. Co. acquired no rights as to lands in said indemnity strip so far as the two routes were on the same general line. *Ib.*
 3. **IDEM — MEXICAN GRANTS.** — Lands claimed to be included in a Mexican grant of a specific boundary, which grant was *sub judice* at the time of the grant of March 3, 1871, were not public land at that date, and did not pass by the grant, though they were afterwards held not to be embraced by the Mexican grant. *Ib.*
 4. **PUBLIC LANDS — GRANT TO RAILROAD COMPANY.** — The congressional acts of 1852 and 1864, granting aid to the Central Pacific Railroad Company in the construction of a railroad and telegraph line to the Pacific Ocean, etc., operated as a present grant of land to the railroad company, upon conditions subsequent, which could only be defeated by breach of conditions, and divestiture of title thereupon, by proper proceedings on behalf of the United States. *United States v. Curtner*, 535.
 5. **IDEM — LANDS GRANTED.** — The lands granted were the odd-numbered sections within twenty miles of the line of the road, such as were public lands at the date of the act, not sold, reserved, or otherwise disposed of by the United States, and such odd-numbered sections within the same limits as were public lands, to which a pre-emption or homestead claim had not attached at the time the line of the road was definitely fixed. *Ib.*
 6. **IDEM — CONCLUSIVENESS OF GRANT.** — No right other than that of the railroad company could be acquired or initiated in any of said odd sections of land, after the filing in the local land office of the district, on January 30, 1865, of the order of withdrawal provided for in section 7 of the act of July 1, 1863. *Ib.*
 7. **IDEM — FILING MAP OF ROUTE.** — The filing of the map of the general route, and the withdrawal thereupon, protected the lands against the acquisition of any other right by any other parties until the line should become "definitely fixed," when the grant became specific by attaching itself to every odd section within the prescribed limits. *Ib.*
 8. **IDEM — STATE SELECTIONS OF LIEU LANDS.** — State selections of lieu lands for school purposes made upon lands unsurveyed by the United States are utterly void. *Ib.*
 9. **IDEM.** — All the state selections shown in the bill being upon lands unsurveyed by the United States at the date of selection, in townships 2 south, 1 east, and 3 south, 3 east, Mt. Diablo B. and M., were therefore void. *Ib.*
 10. **IDEM — WHAT ARE SURVEYED LANDS.** — Lands are not surveyed lands by the United States until a certified copy of the official plat of survey has been filed in the local land office. *Ib.*

11. **IDEM—STATE SELECTIONS—VALIDITY.**—The state selections in question were also void, for the reason that the act of 1853, under which these selections were made, excepted from selection by the state in lieu of school sections lost, "lands reserved by competent authority," and "lands claimed under any foreign grant or title," and "mineral lands." *Ib.*
12. **IDEM—PRIORITY OF GRANT.**—No right of any kind had attached to these lands when they were withdrawn for the purposes of the railroad grant on January 30, 1865, that, under the recent decision of the United States supreme court, in *United States v. McLaughlin*, could prevent that grant from attaching. It was, therefore, the first grant to attach, and by performance of the conditions subsequent, the title of the company became absolute. *Ib.*
13. **IDEM—LANDS EXCEPTED FROM CONFIRMATION.**—The selections in question were excepted from confirmation by the act of 1866; but had it been otherwise, it was not in the power of Congress at that time to divest the right of the company. *Ib.*
14. **IDEM—CONFIRMATORY ACT OF MARCH 1, 1877—EFFECT.**—The act of March 1, 1877 (19 Stats. 267), for like reasons, cannot affect the rights of the railroad company. At the date of this confirmatory act, seven years after the title of this company became perfect, the United States had no interest whatever in the land upon which the act could operate. *Ib.*
15. **IDEM—SALE TO THIRD PERSONS—NOTICE.**—Parties purchasing under state locations in township 2 south, 1 east, since June 10, 1865, had official record notice of the right of the railroad company; for the map filed in the office of the register of the local land office had distinctly indorsed upon it in red ink the following, viz.: "The odd-numbered sections on this plat are granted to the Western Pacific Railroad." *Ib.*
16. **LIMITATION OF ACTIONS—RUNNING OF THE STATUTE.**—The statute of limitations does not run against the United States; and the cause of action here was not stale, the company having been, from the first, active in pursuing its right before the department of the interior. *Ib.*
17. **UNITED STATES CONTRACTS RELATING TO PUBLIC LANDS—ACTIONS.**—The government is not without interest in this action, being responsible to the company for the land or its full value, by reason of the statutory grant and contract in the congressional acts of 1862 and 1864. *Ib.*
18. **PUBLIC LANDS—MEXICAN GRANT.**—The Mexican grant called Las Pocitas was a float—a grant of two leagues within exterior boundaries embracing ten or more leagues, which two leagues so granted were confirmed and patented to the claimants, and the odd-numbered sections outside of the two leagues granted and confirmed, but inside of the exterior boundaries, passed to the railroad company. *Ib.*
19. **IDEM.**—The prior decision, in *Newhall v. Sanger*, 92 U. S. 761, by the United States supreme court, materially limited in its operation by the recent decision in *United States v. McLaughlin*. *Ib.*
20. **RAILROAD GRANT—INDEMNITY LANDS.**—The act of Congress of July 27, 1866, granting lands to the Southern Pacific Railroad Company, was a grant of quantity; and the grantee, upon accepting the grant, filing its map of location and building, and equipping its road in the time and manner prescribed by the act, was entitled to its full complement of land to the amount of ten alternate sections per mile on each side of the road so constructed, provided the same could be found either within the specified present grant or indemnity limits. *S. P. R. R. Co. v. Wiggs*, 568.
21. **DEFINITE MAP OF LOCATION—ORDER OF WITHDRAWAL—DEFINED LIMITS OF INDEMNITY BELT.**—The Southern Pacific Railroad Company filed its map of definite location on the 3d of January, 1867, in the office of the commissioner of the general land office, showing the present granted and indemnity limits thereon, which granted and indemnity limits are clearly defined in the act

- Congress; and the indemnity belt is particularly limited to specified boundaries outside of the granted limits. *Held*, that upon filing the map of definite location, and upon the secretary of the interior issuing his order withdrawing all the lands within forty miles of the line of the road, the odd-numbered sections both within the present granted and indemnity limits were withdrawn from pre-emption, homestead entry, or any other disposition by the general land office. Furthermore *held*, that the statute itself in terms provides that the odd sections shall not be liable to sale or entry or pre-emption other than to the company. Congress intended to withdraw from sale, entry, or pre-emption all those lands set apart within specifically defined limits, as well those authorized to be selected as lieu lands, as those absolutely granted, in which the title itself presently vested. The right of selection indefeasible by pre-emptioners vested upon filing the map of definite location and withdrawal, as provided by the statute, although the title to the land itself did not vest till the selection. *Ib.*
22. **AUTHORITY OF THE SECRETARY OF THE INTERIOR.**—The secretary of the interior had no authority, while a deficiency existed, to allow a pre-emption to be made upon an odd section within these indemnity limits. While such deficiency existed, the secretary could not throw open the odd sections within the indemnity limits to pre-emption or homestead entry. The right of selection, in the company, to these lands, is given in the statute itself, and the secretary cannot revoke it. *Ib.*
23. **JOINT RESOLUTION OF CONGRESS OF JUNE 29, 1870.**—This joint resolution conferred no new rights upon a pre-emptor going upon these lands subsequent to the order of withdrawal. It only saved, and reserved, such rights as he had already acquired before its passage. *Ib.*
24. **CLOUD UPON PLAINTIFF'S TITLE.**—A patent issued in the name of the United States to a pre-emptor, entering upon these lands subsequent to the order of withdrawal, is erroneously issued, without authority of law, and is void. The existence of such a patent is a cloud upon the complainant's title. It embarrasses the assertion of complainant's rights, and prevents it getting a patent to the same land to which it is entitled. These circumstances constitute ground for equitable relief. A patent so issued to a pre-emptor is void, and the using of it should be perpetually enjoined. *Ib.*
25. **DECISION OF SECRETARY OF INTERIOR NOT CONCLUSIVE UPON QUESTIONS OF LAW.**—Where the secretary of the interior, acting upon a known and recognized state of facts, draws therefrom an erroneous conclusion of law, and, in pursuance of such erroneous conclusions, issues a patent to a party not entitled thereto, his action is not conclusive, but is subject to review and reversal by the courts. *Ib.*
26. **PUBLIC LANDS—RAILROAD GRANT—EXCEPTION—MINERAL LAND.**—Where a grant to a railroad company excepts mineral land, the term "mineral land" means land known to be mineral land when the grant took effect, or which there was then satisfactory reason to believe to be such. *Francoeur v. Newhouse*, 610.
27. **ADVERSE POSSESSION—GOVERNMENT TITLE.**—Possession held in subordination to the title of the United States may be adverse as to another claimant. *Ib.*
28. **MEXICAN GRANTS—WHEN CEASE TO BE SUB JUDICE.**—When a Mexican grant by specific boundaries, carrying all the lands within the designated boundaries, has been confirmed by a decree which has been final, the said decree specifically pointing out and designating the corners by natural objects on the ground and the connecting lines, all lands outside those specific monuments and lines from the date when the decree becomes final cease to be *sub judice*, if they ever were in that condition, within the meaning of those terms as used by the supreme court, in the cases of *Newhall v. Sanger*, *Doolan v. Carr*, and *United States v. McLaughlin*. *United States v. Colton M. & L. Co.*, 620.
29. **PUBLIC LANDS—RAILROAD COMPANIES—PLEADING.**—The act of Congress of March 3, 1871, granted certain lands to the S. P. R. R. Co., and provided that if

- its route, when designated, should be found to be on the line of any other road to which land had also been granted, the amount theretofore granted should be deducted from the quantity thereby granted to the S. P. R. R. Co., so far as their route should be on the same general line. In bills brought by the government to set aside a patent to the S. P. R. R. Co., it is alleged that the route of the A. & P. Co., to which land had also been granted, and the route of the S. P. R. R. Co., "cross each other in the state of California." *Held*, that this allegation does not bring the land within the exception of said act, and that under such allegation, even if proof showed that the routes are in fact upon the same general line, it would not avail the government. *Ib.*
30. **RAILROAD COMPANIES—CONGRESSIONAL GRANT.**—The act of Congress of July 27, 1866, fully conferred upon the S. P. R. R. Co. the right to build the road described in and earn the land granted by that act, without the authority of the state legislature. *Ib.*
31. **SOUTHERN PACIFIC RAILROAD COMPANY—AMALGAMATION—RECOGNITION BY CONGRESS.**—The act of Congress of July 27, 1866, recognized the S. P. R. R. Co., organized under a general law of California, and made it certain grants of land. Pursuant to the act of the California legislature of March 1, 1870, authorizing any corporation already formed, or thereafter to be formed, to amend its articles of association, and the act of April 4, 1870, in terms authorizing the S. P. R. R. Co. to file new and amendatory articles of association to enable it completely to conform to the act of Congress of July 27, 1866, the S. P. R. R. Co., and other railroads, October 11, 1870, filed articles amalgamating and consolidating themselves into a new corporation—S. P. R. R. Co. The act of Congress of March 3, 1871, authorized the S. P. R. R. Co. of California (subject to the laws of California) to construct a line of railroad from a point at or near Tehachapa Pass, by way of Los Angeles, to the T. P. R. R. at or near the C. River, with the same rights, grants, and privileges, and subject to the same limitations, restrictions, and conditions as were granted to said S. P. R. R. Co. of California by the act of July 27, 1866. *Held*, that Congress thereby recognized that the S. P. R. R. Co. of California, existing March 3, 1871, under the articles of amalgamation and consolidation of October 11, 1870, was the same S. P. R. R. Co. to which the grant of July 27, 1866, was made. The authority conferred on said company by the act of March 3, 1871, to build the road designated, was made subject, not only to the general laws of California authorizing railroad corporations to amalgamate and consolidate their interests and amend their articles of incorporation, but to the special act of April 4, 1870. *Ib.*
32. **IDEM.**—Pursuant to state authority, recognized by and made a part of the congressional grant of March 3, 1871, the S. P. R. R. Co., April 15, 1871, filed amended articles of incorporation; and August 12, 1873, filed, together with the S. P. Branch R. R. Co., articles of amalgamation and consolidation, under the name of the S. P. R. R. Co. *Held*, that while in one sense a new corporation was formed, each was substantially and practically the same S. P. R. R. Co. mentioned in the acts of Congress, and was so recognized by Congress, and that the articles of amendment, amalgamation, and consolidation were authorized by congressional as well as by state legislation. *Ib.*
33. **IDEM.**—Commissioners having from time to time been appointed to report in regard to the construction of the Southern Pacific Railroad, the road having been accepted by the President, and having been used by the government in the transportation of mail, military stores, etc. *Held*, that these acts were acts recognizing the defendant company as the S. P. R. R. Co., to which the act of March 3, 1871, applies, and that the defendant company, being subject to burdens imposed by the act, is entitled to the benefits conferred by it as a consideration for those burdens. *Ib.*
34. **RAILROAD COMPANIES—SUCCESSORS AND ASSIGNS.**—The act of Congress of July 27, 1866, having expressly granted lands to S. P. R. R. Co., its successors and

assigns, it is *held*, that if the consolidated company with the amended articles of incorporation is not technically the same corporation referred to in the act of March 3, 1871, it is within the express provisions of the grant, being the successor or assign of said company. *Ib.*

See PUBLIC LANDS.

REMOVAL OF CAUSES.

1. REMOVAL OF CAUSES—TIME OF APPLICATION—STIPULATIONS EXTENDING TIME TO PLEAD.—Under the removal act of 1887, requiring the petition for removal to be filed "at the time, or any time before, the defendant is required by the laws of the state, or the rule of the state court in which the suit is brought, to answer or plead to the declaration or complaint," an extension of time to answer by consent of parties does not extend the time for filing the petition for removal. *Dixon v. West. U. Tel. Co.*, 17.
2. REMOVAL OF CAUSES.—TIME OF APPLICATION.—Defendants demurred to plaintiffs' complaints in the state court. The demurrers were heard and sustained in the state court, and plaintiffs were given leave and time to file amended complaints, which they filed. To plaintiffs' amended complaints defendants demurred, and at the same time filed their petitions and bonds for the removal of the cases to this court. *Held*, that the petitions and bonds were not filed within the statutory time, and that the cases must be remanded. *Delbanco v. Singletary*, 124.
3. IDEM—FILING TRANSCRIPT OF RECORD—RULE OF COURT.—Under rule 79 of this court (ninth circuit) the plaintiff may, at any time after defendant has filed and submitted to the state court his petition and bond for the removal of the cause, procure a transcript of the record of the cause from the state court, and file the same in this court, and after service of notice thereof, as provided in said rule, this court will take jurisdiction of the case for all purposes. *Ib.*
4. REMOVAL OF CAUSES—CASE ARISING UNDER UNITED STATES STATUTE—PETITION.—In order to remove a cause from a state to a United States court, under the act of 1887, on the ground that it arises under a statute of the United States, the record must affirmatively show, from the facts alleged, that some disputed construction of the statute will arise for decision in the case. *Austin v. Gagon*, 151.
5. IDEM.—Where the contest is about the facts only, the law being undisputed, there can be no removal. *Ib.*
6. IDEM—TIME OF APPLICATION—SUBSEQUENT EXTENSION OF TIME TO PLEAD.—The application for removal, under the act of 1887, must be made at or before the expiration of the time to answer, as prescribed by the statute or rules of court in force at the time of the service of the summons. Subsequent extensions of time to answer by special orders of the court, or by stipulations of the parties, cannot extend the time to apply for a removal under the statute. *Ib.*
7. IDEM—TIME TO FILE BOND.—The bond required by the statute, as well as a petition, must be filed at or before the time for answering expires, to effect a removal. *Ib.*
8. IDEM—FILING NUNC PRO TUNC.—The court cannot, by an order made after the time to answer has expired, directing the bond to be filed *nunc pro tunc* as of a day prior to such expiration of time, cut off the right of the plaintiff to remain in the state court, which has already become vested and fixed under the statute. *Ib.*
9. REMOVAL OF CAUSES—LOCAL PREJUDICE.—Under the Revised Statutes of the United States, section 641, providing for removal of a cause before final hearing, "when any civil suit or prosecution is commenced in any state court, for any cause whatever, against any person who is denied, or cannot enforce in the

- judicial tribunals of the state, any right secured to him by any law providing for the equal civil rights of a citizen," a prosecution against a Chinaman for having in his possession a lottery ticket, under a law applying to "any person," cannot be removed on the ground of local prejudice or maladministration of the law. *State of California v. Chue Fan*, 577.
10. REMOVAL OF CAUSES—TIMELY APPLICATION—REMAND.—Where a petition for removal is not filed at the time or before defendant is required by the state practice to plead to the declaration or complaint, as provided in the act of Congress, March 3, 1875, section 5 (25 Stats. at Large, 434, sec. 3), the case must be remanded to the state court, whether motion to that effect be made or not. *Bowers v. Supreme Council Am. Legion of Honor*, 619.

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SURVEYS.

1. LOCATING PATENT—SURVEYS.—On a question as to the true location of a patent, boundaries fixed by reversing the courses and distances must govern when found to coincide with the natural calls of the patent. *Ellingwood v. Stanchiff*, 467.
2. IDEM.—When the points fixed by reversing the courses and distances do not coincide with the natural calls of the patent, or the natural calls cannot be identified, then the regular courses and distances must govern. *Ib.*

SWAMP LANDS.

1. SUIT AGAINST A STATE.—A suit by a citizen of California, to enjoin the persons constituting the board of land commissioners of the state of Oregon from selling certain swamp lands, claimed by the plaintiff, as forfeited to the state for non-compliance with a condition of a former sale of the same lands by the state,

to the plaintiff's grantor, is not a suit against the state of Oregon, it appearing that the legislation under which the defendants claim the right to act is unconstitutional and void, because it impairs the obligation of the contract of the state with such grantor. *McConaughy v. Penoyer*, 584.

2. **CONTRACT FOR SALE OF SWAMP LANDS.**—An application for the purchase of swamp lands under section 3 of the act of October 26, 1870, for the selection and sale "of swamp lands," from the date of its receipt and filing by the land commissioner, constitutes a contract between the state and the applicant for the sale to the latter of the tract or tracts therein mentioned, with the right to the immediate possession thereof; and on the performance of the conditions subsequent of payment and reclamation, within the terms and requirements of said section, the applicant or his assigns is entitled to a patent therefor. *Ib.*
3. **STATUTES OF OCTOBER 18, 1878, AND FEBRUARY 16, 1887.**—Section 9 of the act of 1878 does not, when fairly construed, include an application for the purchase of swamp land under the act of 1870, when there is no default in the payment of the twenty per centum of the purchase price as provided in said act of 1870; but if it does include such a case then it is unconstitutional and void, as impairing the obligation of the contract of the state with the applicant, which gave him until ninety days after the publication of the notice of the filing of the map of such lands in the office of the clerk of the county in which they lie to make such payment; and section 1 of the act of 1887, which declares all certificates of sale of swamp lands void on which the twenty per centum of the purchase price was not paid prior to January 17, 1879, is, in the case where the twenty per centum was paid when due, according to the contract of sale, whether before or after said day in 1879, unconstitutional and void for the same reason. *Ib.*
4. **CLOUD ON TITLE.**—A resale and conveyance of a tract of swamp land under the act 1887, before sold by the state under the act of 1870, on the ground that it had reverted to the state for the failure to pay the twenty per centum of the purchase price within the time required by law, would cast a cloud on the title of the purchaser or his assignee under the act of 1870. *Ib.*
5. **MULTIPLICITY OF SUITS.**—The prevention of a multiplicity of suits is an acknowledged head of equity jurisdiction, and this suit is clearly maintainable on that ground. *Ib.*
6. **SUIT AGAINST A STATE.**—This is not a suit against the state of Oregon or its authorized agents or representatives, but against the defendants, claiming to act as such, but without authority of law. The cases of *In re Ayers*, 123 U. S. 443, and *Hans v. Louisiana*, 134 U. S. 1, considered and distinguished from this. *Ib.*

TIDE LANDS.

1. **"SHORE" OR TIDE LANDS.**—On the admission of a new state into the Union, the "shore" or tide lands therein, not disposed of by the United States prior thereto, become the property of the state. *Case v. Loftis*, 213.
2. **IDEM.—RIGHT OF ACCESS TO.**—The owner of land abutting on the "shore" or tide lands in this state, and not disposed of by the United States or the state, has a right of access from his land to the water, and may erect and maintain a private wharf there for his own convenience, so long as he does not materially interfere with the rights of the general public, and subject to the power of the legislature to regulate such use. *Ib.*
3. **PUBLIC LANDS—CUTTING TIMBER—PAYMENT FOR LAND.**—A party prosecuted for cutting timber on the public lands under section 2461, Revised Statutes, is only relieved from the criminal prosecution and liabilities provided for in said section 2461 by payment of two dollars and a half per acre for the land on which it is cut; he is not relieved from his civil common-law liability to the United States as owner of the land for the value of the timber cut. *United States v. Scott*, 321.

TIMBER AND MINERAL LANDS.

See PUBLIC LANDS.

TONNAGE TAX.

See CUSTOMS.

TOWAGE.

See ADMIRALTY.

TRUST.

1. **SALE OF PROPERTY IN TRUST.** — A sale of property "in trust," held under the circumstances not to be a sale in trust to pay the debts of the vendor. *First Nat. Bank v. Salem U. F. M. Co.*, 84.
2. **GRANTOR'S LIEN.** — A grantor's lien on the premises conveyed, for the purchase price, is a personal privilege, not assignable with the debt, nor can the creditor of the grantor be subrogated to the same. *Ib.*
3. **PURCHASE OF STOCK BY A CORPORATION.** — In the absence of any statute to the contrary, a corporation may purchase and dispose of its own stock, provided the same is done in good faith, without intent to injure the creditors thereof, and they are not injured thereby. *Ib.*
4. **EXECUTION OF DEED BY AN ATTORNEY.** — An attorney of a corporation must execute a deed in the name of his principal, but under his own hand and seal. *Ib.*

WAGON ROAD LAND GRANTS.

See PUBLIC LANDS.

WATER RIGHTS.

1. **CORPORATIONS — ACTIONS BY AND AGAINST.** — The Code of Civil Procedure of California, section 388, provides that "when two or more persons, associated in any business, transact such business under a common name, whether it comprises the names of such persons or not, the associates may be sued by such common name." *Held*, that a bill to enjoin interference by defendants with complainant's alleged right to divert water from a stream, against the "South Fork and Sunnyside Division of the Santa Ana River," which, it appears, is an association formed and existing pursuant to the laws of California, is sufficient, without making the owners and stockholders thereof parties. *Hewitt v. Storey*, 317.

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